APPENDIX

JUL 17 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

TERM, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,

Petitioners,

v.

JEFF JACOBS, SUSAN CHANDLER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MARCH [illegible], 1974

CERTIORARI GRANTED JUNE 3, 1974

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Docket No. 72-C-263

(Caption Omitted)

RELEVANT DOCKET ENTRIES

Date	Proceedings
6/1/72	Complaint filed. Motion for Temporary Restraining Order filed.
8/21/72	Defendants file answer to Complaint. Defendants file Memorandum in Opposition to Motion for Temporary Restraining Order, Injunction and other relief.
8/22/72	Petition for Appointment of Guardian Ad Litem or Next Friend for Plaintiffs and all Members of the Class they Purport to Represent filed.
8/24/72	Hearing on Motion for Temporary Restraining Order was commenced. Oral arguments are heard on the collateral issue. Court denied Defendants' Motion to assign Guardian Ad Litem. Opening arguments of counsel are heard. Evidence of the Plaintiffs is heard in part. Dr. Karl Kalp files affidavit. Defendants file additional authorities in opposition to Plaintiffs' Motion for Temporary Restraining Order and injunctive relief.
8/25/72	Evidence of the Plaintiffs is heard and concluded. Plaintiffs rest.
8/29/72	Court orders that no additional nor supplemental hearings be held with respect to plaintiff's motion for temporary restraining order, and in further consideration of the fact that defendants do not intend to present additional evidence with respect to plaintiff's prayer for preliminary injunction and that the Board of School Commis-

Date	Proceedings
	sioners of the City of Indianapolis shall have three (3) weeks from the date of this order to adopt reasonable guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis.
9/21/72	Parties file stipulation for extension of time for defendants to respond to Court's order to file its amended rules and guidelines.
9/21/72	Court grants and approves stipulation of the parties that the defendants shall have until September 27, 1972 to respond to the Court's order to file its amended rules and guidelines in this case.
9/27/72	Defendants file motion to amend answer by additional paragraph of answer with consent of plaintiffs, c/s, which motion contains the defendants' amended rules.
9/29/72	Parties by counsel having met in conference with the Court on September 27, 1972, and the Board of School Commissioners of the City of Indianapolis having adopted Resolutions 1033 and 1034, which Resolutions amend Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners, the Court now takes the matter under advisement for further consideration, and IT IS ORDERED that plaintiffs submit to the Court reasonable guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis no later than October 6, 1972. IT IS FURTHER ORDERED that the Board of School Commissioners of the City of Indianapolis submit to this Court additional and/or supplemental guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis no later than October 13, 1972.

Date	Proceedings
10/4/72	Plaintiffs file guidelines RE: distribution and sale of student publications.
10/12/72	Court grants motion to file additional paragraph of answer.
10/12/72	Defendants file additional paragraph of answer.
10/19/72	Court approves entry on motion for permanent injunction. (Case Closed)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket No. 72-2030

(Caption Omitted)

RELEVANT DOCKET ENTRIES

Date	Proceedings
11/9/72	Notice of appeal to the Seventh Circuit Court of Appeals from judgment and order of District Court.
2/28/73	Appellants' Brief filed.
3/28/73	Appellees' Brief filed.
4/13/73	Appellants' Reply Brief filed.
9/19/73	Oral argument before United States Court of Appeals for the Seventh Circuit.
12/14/73	Opinion of United States Court of Appeals for the Seventh Circuit filed. Affirmed, Judge Christensen Dissenting in part.

PLEADINGS:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 72-C-263

JEFF JACOBS, SUSAN CHANDLER,
ET AL.,

Plaintiffs,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS,
ET AL.,

Defendants.

COMPLAINT
Filed 6/1/72

Jurisdiction

1. This is an action for declaratory and injunctive relief, and for damages. . . . The rights, privileges and immunities sought to be declared and redressed are those secured by the First and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3, 9, and 23 of the Constitution of the State of Indiana.

2. This is a proceeding for a declaratory judgment that the rule, regulation and policy of the above-named defendants . . . prohibiting and suppressing the distribution of a publication contravenes the Constitutional provisions cited. This proceeding also seeks an injunction against the Commissioners enjoining them from continuing to prohibit and suppress the publication, as well as damages resulting from such prohibition and suppression.

3. This is a class action under Fed. R. Civ. P. 23(a) and (b)(2).

PARTIES

• • •

10. Plaintiff class members are all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indian-

apolis. Their number makes joinder impracticable, the questions of law are common to the class, the claims of Jeff, Susan, Martin, Nancy, Sally, and George are typical of the class, and they can adequately protect the interests of the class.

* * *

FACTS

14. In the late summer and early autumn of 1971, Jeff, Susan, Martin, Nancy, Sally, and George, met, together with fellow students, and class members, from public high schools governed, managed and controlled by the Commissioners, for the purpose of forming a new student publication which was eventually called "The Corn Cob Curtain." (Hereinafter referred to as "CCC").

* * *

16. . . . One of the decisions which they helped make was that there would not be an editor-in-chief or other person with dominant authority over the paper. . . .

17. *CCC* was not sold for a set price. Donations were accepted which ranged from $0.05 and up. . . .

18. *CCC* was intended as a forum for the expression of all views in the public education community. Contributions were published from students not among those considered as part of the staff, and the paper was open to contributions from teachers, administrators, and others having interests related to high school students.

* * *

20. *CCC* was openly distributed on many occasions in public schools governed, managed and controlled by Commissioners under color of law. . . . On Wednesday, February 9, 1972, an announcement was made over the public address system at Arsenal Technical High School to the effect that "It is against school board rules to sell any item on school grounds without the express prior approval of the General Superintendent." . . .

* * *

24. . . . Mr. Kalp stated that he would not permit distribution of *CCC* because he believed it was obscene. . . .

* * *

27. Staff members and persons who distributed *CCC* . . . voluntarily suspended distribution pending resolution of Jeff's inquiry to the administrators. . . .

• • •

33. At no time has the distribution of *CCC* been prohibited or suppressed as allegedly constituting a substantial, continuing, and material disruption of school activities. There has been no objection by Mr. Kalp, Mr. Kincaid, or the Commissioners to the place, time, or manner of distribution. No charge has been made by them that it is libelous.

34. The wilful refusal of the Commissioners to follow the requirements of the law with respect to student publications in the light of advice of counsel, is a proper ground for the assessment of punitive damages.

35. Money damages cannot, however, remedy the irreparable harm done by the suppression and prohibition of the rights of free press, thought and expression as well as of equal protection of the laws described above. No adequate remedy exists at law for those deprivations which continue to occur and will occur in the future unless enjoined by this court.

• • •

WHEREFORE, plaintiffs JEFF JACOBS, SUSAN CHANDLER, MARTIN LAUBACH, NANCY ROOD, SALLY SWAN, GEORGE YARBROUGH, on behalf of themselves and all others similarly situated, respectfully request this court to:

1. Declare that the actions of Mr. Kalp, Mr. Kincaid, and the Commissioners of prohibiting and suppressing distribution of *CCC* under color of law are illegal and unconstitutional.

2. Enter a preliminary and permanent injunction:

(a) Restraining, prohibiting and enjoining the Commissioners, their agents, servants and employees, and all persons in active concert and participation with them, from enforcing, applying or implementing the rules, regulations and policies of the Commissioners which prohibit and suppress the distribution of *CCC* within schools operated by them;

(b) Restraining, prohibiting and enjoining the Commissioners, their agents, servants and employees and all persons in active concert and participation with them from maintaining any disciplinary reports, memoranda or other notations concerning Jeff, Susan, Martin, Nancy, Sally, or George and their activities in connection with *CCC*, and causing all files, transcripts or other records subject to the Commissioners' control to have such material expunged from them.

3. Award $150.00 compensatory damages, and punitive damages in a nominal or other amount in the court's discretion, to Jeff, Susan, Martin, Nancy, Sally, and George.

4. Award costs of the action, but not attorney fees, to Jeff, Susan, Martin, Nancy, Sally, and George.

5. Grant such other relief as the court may deem just and proper.

Respectfully submitted

Craig Eldon Pinkus /s/
CRAIG ELDON PINKUS
Attorney for Plaintiffs

• • •

UNITED STATES DISTRICT COURT

(Title omitted in printing)

ANSWER TO COMPLAINT

Filed 8/1/72

FIRST DEFENSE

Come now the defendants and for first defense to the complaint state:

1. It denies the allegations contained in rhetorical paragraphs 1, 2 and 3 of the complaint.

2. Defendants are without sufficient information to admit or deny as pleaded the allegations contained in rhetorical paragraphs 4, 5, 6, 7, 8 and 9.

3. With respect to rhetorical paragraph 10, defendants deny the allegations therein, on the grounds that this is

not and should not be a class action, and further state that it appearing that the plaintiffs are all minor children, there is a legal question presented as to whether they are capable of representing themselves without a guardian ad litem or next friend appointed by the court, and defendants specifically allege that plaintiffs are certainly not capable of representing all of the high school students in the area alleged.

4. They admit the allegations contained in rhetorical paragraph 11.

5. With respect to the allegations in rhetorical paragraph 12, they admit that the parties defendant acted legally, and deny any and all other intendments and allegations contained therein.

6. With respect to rhetorical paragraph 13, defendants admit that they acted legally at all times, and specifically Karl Kalp and Wayne Kincaid acted legally at all times mentioned in the complaint, and specifically deny any and all other allegations or intendments in said paragraph.

7. Defendants are without sufficient information to admit or deny the allegations contained in rhetorical paragraphs 14, 15 and 16 of the complaint.

8. With respect to the allegations contained in rhetorical paragraph 17, the defendants admit that the paper in question was sold, but are without sufficient information to admit or deny the remaining allegations in said paragraph.

9. With respect to rhetorical paragraphs 18 and 19 of the complaint, the allegations as pleaded therein are denied.

10. With respect to rhetorical paragraphs 20, 21, 22, 23, 24 and 25, which constitute in the main the pleading of evidentiary facts, these defendants state that they are without sufficient information at this time to admit or deny all of the allegations contained therein.

11. With respect to rhetorical paragraph 26, it is not known what the plaintiffs know about compliance of the Commissioners with the law, and it is not known what their informal discovery has disclosed, nor is it known who it is that plaintiffs contend cited policies and regulations of the Board of School Commissioners, for the reason that this rhetorical paragraph, like the previous paragraphs, contains evidentiary as well as redundant material in the

main; the defendants state they are without sufficient information at this time to admit or deny said allegations.

12. With respect to rhetorical paragraphs 27 and 28 of the complaint, defendants are without sufficient information at this time to admit or deny said allegations, for the same reasons set forth in previous paragraphs of answer.

13. With respect to rhetorical paragraphs 29 and 30, the defendants admit that Mr. Kalp and Mr. Kincaid acted legally in taking the action taken by them, and deny all other allegations and intendments.

14. With respect to rhetorical paragraph 31, defendants admit that the Commissioners acted legally in affirming Mr. Kalp's position, and deny all other allegations and intendments therein.

15. The defendants deny the allegations contained in rhetorical paragraphs 32, 33 and 34.

16. With respect to rhetorical paragraph 35, defendants state that plaintiffs are not entitled to money damages or equitable relief and the defendants deny that any of plaintiffs rights have been violated.

17. With respect to rhetorical paragraph 36, there is no basis whatsoever for the claim that records of the plaintiffs should be expunged.

18. With respect to rhetorical paragraph 37, the allegations therein are denied.

WHEREFORE, the defendants and each of them pray that the relief requested in the complaint for declaratory judgment, temporary restraining order, injunction and all other relief be denied.

BREDELL, MARTIN & MCTURNAN

(Signatures omitted in printing)

SECOND DEFENSE

Come now the defendants and for second defense to plaintiffs' complaint and petition for other relief say:

1. No rights of plaintiffs have been violated whatsoever.

2. No irreparable damage will be done plaintiffs if a temporary restraining order and/or injunction are denied.

3. In addition to the foregoing, the prevention of the publications were clearly justified for the following reasons:

A. The distribution involved solicitation.

B. The publications are obscene.

C. The publications are libelous.

D. The publications are indecent, vulgar and profane.

E. The publications advocate and encourage a disregard of fundamental educational concepts and procedure.

F. The publications advocate violent action and even destruction of a school and murder of its principal.

G. The publications subject the teachers and staff to ridicule, humiliation and scorn.

H. Publications and solicitation of this sort are inherently and in fact were distractive and disruptive, and interfere with the function of the school to teach.

I. The Superintendent had ample grounds to stop distribution and sale of these publications.

J. Cases cited by plaintiff are distinguishable from this case and the law applicable thereto.

WHEREFORE, the defendants and each of them pray that plaintiff be denied all relief prayed for in the complaint and for all other relief proper in the premises.

BREDELL, MARTIN & MCTURNAN

(Signatures and Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT

(Title omitted in printing)

AFFIDAVIT

Filed 8/24/72

Comes now Karl R. Kalp, who being first duly sworn upon his oath, states:

1. He is acting Superintendent of the Indianapolis Schools.

2. He has been connected with the Indianapolis School System since 1948.

3. He is familiar with all aspects of the Indianapolis

School System, the educational goals of the community and the administration, morals and standards of the community respecting conduct of students and personnel in and about the schools.

4. He has had varied experiences with student problems, problems of salesmen frequenting the campuses and is qualified to speak upon the subject of dissemination of materials, sales and distributions of matters in the public school system and the effects upon the educational system of such activity.

4. He did prevent plaintiffs from distributing the "Corn Cob Curtain" on the campuses of the Indianapolis schools after lengthy consultations with teachers, the plaintiffs, attorneys, administrators, assistant superintendents and principals in the system.

5. It is the opinion of affiant that the distribution of the "Corn Cob Curtain" would be very harmful to the students, teachers, principals and administrators of the Indianapolis School System.

6. Following are some of the reasons why affiant believes that distribution of the "Corn Cob Curtain" would be harmful:

A. Potential disruption which would be occasioned by the distribution of a paper which contained some of the items found in the "Corn Cob Curtain."

A large secondary school in these times is particularly susceptible to disturbances. The students may have been brought up on a diet of confrontation, conflict and in many instances actual violence. Under these circumstances it is not difficult to understand the apprehension with which secondary administrators view any potential for disturbing the normal course of events that usually obtains in a high school. Given the ratio of students to adults in a school situation, it is apparent that when control of the school is lost it is extremely difficult, if not impossible, to restore order without subjecting many people to dangers which are both unnecessary and undesirable for a school environment. The decision not to permit the paper to be distributed on high school campuses had to take into consideration that disturbances and unrest had occurred at various high schools. These disturbances had occurred at what was con-

sidered by the administration to be an alarming frequency. Under these conditions it seemed clearly unwise to support the distribution of anything which would contribute to the instability and potential for disruption in a situation which was already fraught with tension, particularly when there had recently been violent disruptions, arson, attempts at arson, vandalism, attacks and abuse of students and teachers for no apparent reason.

B. The result of the distribution of such a paper on the attitude the pupils would have toward the administrators who were described in unflattering, vulgar and obscene terminology.

The administrators who were described in some issues of the paper by language which is crude, vulgar and obscene, are persons who occupy positions of responsibility in the schools. These crudities and obscenities could do nothing but diminish the respect and esteem of the administrators by the pupils. A large part of the successful administration of a high school is the development and maintenance of esprit de corps among the student body. It can exist only under conditions which promote mutual respect among students, faculty and administration. Describing the administrator as a grotesque charicature in comic strip fashion can scarcely be construed as improving the conditions of mutual respect between students and administrators. This eroding of respect results in a much more difficult task for the administrators, the daily decisions which are necessary to insure the safety and to promote the optimum conditions for learning for all students are gravely in danger when the persons who are required to make those decisions are subjected to ridicule and vulgarities. Teachers cannot teach and students cannot learn unless there is a reasonable degree of uniformity and order in the schools. To satisfy the whim of an infinitesimal minority of the student body, the learning conditions for all students are imperiled.

C. The effect that the distribution of such a paper might have on classroom atmosphere.

Most high school students are in a period of development during which they have unusual exuberance, high energy output and great distractibility and have not yet become

comfortable with the adult emotions which they have acquired so recently and so rapidly. With several thousand of these young people collected together in the relatively narrow confines of a high school the potential for volatility is greatly increased. Frequently it takes only the slightest excuse to set off a chain of circumstances which permits an emotional release. All teachers know the difficulty of receiving a class which comes to that teacher hyper-stimulated by some activity in a previous class or some occurrence which they experienced on the way to class. It is not unusual to find situations which require the teacher to take the first 5 or 10 minutes of every class period to quiet down the class after it has been subjected to some emotion-evoking condition. The distribution of material such as that contained in the "Corn Cob Curtain" is almost certain to be the occasion, sooner or later, for the display of emotions and/or a real or fancied excuse for a display of strong feelings. The potential for disrupting the learning environment even though it may not be one accompanied by violence (though violence could very well erupt over the content of the "Corn Cob Curtain"), is extremely great and is something which prudent teachers and administrators seek constantly to avoid in order not to impede the opportunities for learning for all the students in their charge.

D. The need for some control over the kinds of printed materials that may be placed in the hands of pupils.

The laws of the State of Indiana require the attendance of children at school. The resulting student body of any school is thus a "closed" group about which neither the pupil nor his parents have any choice about joining. As such, it would seem reasonable that parents should expect that the Board of School Commissioners, their elected representatives, should exert influence to maintain a quality of literature on the school grounds—in classrooms and outside the classrooms, that reflects and is commensurate with the goals of education that are accepted by society in general and the local community in particular. Public education cannot survive with any other basic concept.

E. *Solicitation and distribution.* Affiant is familiar with the origin of rules of the school under Sections 11.05 and 11.06. Section 11.05 has been used during his tenure with

the school system to avoid people coming onto the campus with non-educational material and attempting to distribute them for various purposes, including salesmen who would approach teachers individually with items for sale and who, in the past, have actually attempted to make gifts to teachers to encourage them to recommend something to the administration for purchase. It has also been used to keep people from distributing inflammatory and dangerous, as well as libelous, obscene and other highly undesirable matter, such as Klu Klux Klan material, and other publications which no one would find related in any way to the educational goals of this community. Section 11.06 specifically refers to sales, but 11.05 has been very helpful in eliminating the type of conduct which is designed to lead to sales and which is not actually covered by 11.06 which deals with the actual sale itself or collection of money.

F. While there is some matter in the "Corn Cob Curtain" that is quite harmless, including some of the humor, poems, letters and editorials, the publications are so littered with obscenity, vulgarism, indecency, possible defamatory matter and matter which is designed to encourage disregard of school rules, that the publications as a whole are very damaging to the education of the children of this community.

G. There are many other reasons why this paper should not be allowed on the campuses of the schools, not the least of which is that if the school permits this paper to be distributed on the campuses, it is in effect lending its support and approval to the kind of material contained therein, and at the same time trying to teach children the use of proper language, the avoidance of vulgarity, crudity, obscenity and defamatory language. A great majority of the children in the school system would be very much opposed to the matter contained in this "Corn Cob Curtain" newspaper, and would lose respect for an administration that encouraged or allowed its distribution. Once losing respect of the administration, these children might also feel that there was no use in following the advice of adults who advised them in one fashion in the classroom and then approved distribution of offensive and obscene material in the halls. This could and definitely would discourage many students

and cause them to lose faith in their teachers. We can all recount numerous situations where a young child has had only his teacher to look to for training with respect to moral codes, decency, honor and integrity. If this trust is shattered many of our children will have no desirable adult models to emulate.

H. Practically all, if not all of our teachers in this system are shocked at some of the words which appear in this publication. Many teachers will despair of trying to teach anyone about decency and moral obligations and responsibilities if this type matter is distributed in our schools.

I. With respect to the contention that there is a time and place in the schools for the distribution of this type material, as an experienced teacher, vice principal, guidance director, assistant dean and assistant superintendent, and acting superintendent, I can and do categorically state that even if distribution is so limited to a time and place the damaging effects will permeate the entire system and will be no less detrimental. Once distributed, who is to say that the distributees will not display them to everyone they meet. "YOU CAN'T UNSPREAD BUTTER."

J. There is no time and place in our school system for filth and obscenity, libel and advocacy of violence.

Karl R. Kalp /s/
KARL R. KALP

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT

(Title omitted in printing)

Filed 9/27/72

DEFENDANTS' MOTION TO AMEND ANSWER BY ADDITIONAL PARAGRAPH OF ANSWER (CONTAINING AMENDED BOARD RULES)

Come now the Defendants and respectfully move the Court to allow them to file additional paragraph of answer, on the following grounds:

1. Since this Court's Order of August 29, 1972, Defendants have amended Rules 11.05 and 11.06 of the Rules

of the Board of School Commissioners, which Rules, as amended, are attached hereto and marked Exhibits A and B, respectively.

2. Since the lawsuit involved the predecessors of 11.05 and 11.06, no question is now before this Court as to the constitutionality of the Rules as presently constituted.

3. Defendants believe that the Rules, as presently constituted, are sufficient to withstand any attack of unconstitutionality.

4. It is essential to the proper defense of this case that the amendment of answer by additional paragraph thereof be filed.

5. A copy of the proposed additional paragraph of Answer is attached hereto and marked Exhibit C. (Exhibit C omitted in printing)

6. Attorneys for Plaintiffs have advised attorneys for Defendants that they are agreeable to the filing of this Answer.

WHEREFORE, Defendants pray that they be allowed to file an additional paragraph of answer to put at issue the new Rules as presently constituted.

Respectfully submitted,
BREDELL, MARTIN & MCTURNAN

(Signatures and Certificate of Service omitted in printing)

EXHIBIT A TO DEFENDANTS' MOTION TO AMEND ANSWER

RESOLUTION NO. 1033, September, 1972

RESOLUTION RESCINDING SECTION 11.05 OF *POLICY & REGULATIONS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS* AND ADOPTING A NEW POLICY PERTAINING TO DISTRIBUTION AND DISPLAY OF WRITTEN AND PICTORIAL MATERIAL BY STUDENTS

WHEREAS, legal counsel has reported that Section 11.05 of the Rules of the Board has been declared unconstitutional by the Federal District Court for the Southern District of Indiana, and that a modification of said rule by provid-

ing procedural safeguards for students is advisable to avoid further litigation; and

WHEREAS, said legal counsel have prepared a proposed revision providing said safeguards;

IT IS, THEREFORE, RESOLVED that Section 11.05 be rescinded and the new rule shall read as follows:

The Board of Education desires to encourage individual freedom of expression and creativity by students within the Indianapolis Public School System and will approve the general distribution and/or display of any written and pictorial matter which upon review will not materially or substantially (1) interfere with the proper and orderly operation of the school (2) disrupt class or school activities, or (3) infringe upon the rights of others.

Prior to general distribution or display, all such material shall first be submitted to the principal or to such Review Board as may be designated within each individual school by the principal.

The principal or Review Board shall review the material to determine whether or not approval for distribution or display shall be given and shall inform the student or students of a decision by 9:00 a.m. of the second regularly scheduled school day following the date of submission of the material or such sooner time as may be reasonably practicable. If the student or students do not receive notice of a decision within the time aforesaid, it shall be presumed that the material is approved for distribution.

In the event that the material is approved for general distribution or display or no notice is given within the time set forth above, the student or students may distribute or display such material at the time and place customarily designated for such purpose within each school or, if such place is inappropriate, shall be advised of the manner, time, and place for distribution or display and shall be given a reasonable opportunity to generally distribute such material consonant with the physical facilities, operation, and educational routine of the school.

In the event that the material is not approved, the student submitting the material shall be notified in writing of the rejection and the reason for the rejection shall be included. Said student shall thereafter be entitled to a hearing by filing a charge with the Superintendent in the manner provided by Public Law 162 to the extent applicable.

In granting or denying approval, the following guidelines or rules shall apply:

1. No material shall be distributed which, either by its content or by the manner of distribution itself will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.
2. No obscene material shall be distributed.
3. No libelous material shall be distributed.
4. No material shall be distributed unless the editor or some person in charge of the material verifies the identity of the author(s) of the material.
5. No material shall be distributed which contains indecent, vulgar or profane language, cartoons or pictures.
6. No material shall be distributed which advocates lawlessness or a disregard of school rules.
7. No material shall be distributed which subjects school administrators and personnel to ridicule. Responsible criticism shall be allowed.

Where the principal or Review Board deem it desirable, each school may enact supplemental regulations relating to the general distribution or display of student material within the scope and spirit of this policy.

The purpose of this policy is to encourage responsible student activity and to this end the policy is to be applied reasonably and responsibly taking into consideration the rights of the students, faculty, and school administration in conjunction with the physical facilities and orderly operations of the school.

For violation of this rule, a student may be suspended or expelled from school or the administrators

or teachers of the school corporation may take any other action reasonably desirable or necessary to help any student, to further school purposes, or to prevent an interference therewith.

EXHIBIT B TO DEFENDANTS' MOTION TO AMEND ANSWER

AMENDED RESOLUTION NO. 1034, September, 1972

AMENDED RESOLUTION MODIFYING SECTION 11.06 OF POLICY & REGULATIONS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS CONCERNING THE SALE OF ITEMS OR SOLICITATION OF FUNDS WITHIN THE SCHOOL.

WHEREAS, legal counsel has reported that Section 11.06 of the Board Regulations has been questioned by the Federal District Court for the Southern District of Indiana, that a modification of said rule is advisable to eliminate any possible discrimination among people desiring to sell merchandise or collect money;

IT IS, THEREFORE, RESOLVED by the Board of School Commissioners of the City of Indianapolis that Section 11.06 is amended to read as follows:

> No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, *or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance*, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus.

UNITED STATES DISTRICT COURT

(Title omitted in printing)

ADDITIONAL PARAGRAPH OF ANSWER
Filed October 12, 1972
(CONTAINING SECOND AMENDMENT OF BOARD RULES)

THIRD DEFENSE

Come now the defendants and for third defense say:

1. Rules 11.05 and 11.06 have been amended since the hearing and entries in this case respecting guidelines for publication and circulation of newspapers.

2. Exact copies of the resolution amending Rules 11.05 and 11.06 are attached hereto and marked Exhibits A and B respectively and the resolution adopting the disciplinary and procedural rules of the Board is attached hereto as Exhibit C. (C omitted in printing)

3. Said rules are not unconstitutional.

4. The proposed newspaper which is an exhibit in this case does not meet the standards of these rules for reasons enumerated in previous paragraphs of answer and contentions of defendants in this case.

5. Any subsequent newspaper complying with the standards of 11.05 and circulation of which does not violate 11.06 would be allowed on the school campuses under the conditions and at the time and place set forth in said rules.

6. It is absolutely essential that the school have the right to limit sales on campus to those situations enumerated in Rule 11.06 to avoid unlimited solicitation, collection and sales and the attendant disruption of school functions naturally caused thereby.

7. It is absolutely essential that the school authorities have some voice over the distribution of student publications on school campuses, to avoid disruption, to prevent obscenity, indecency, libel and slander, from permeating the school system to the harm of the system, its students and faculty, and to guard against irreparable injury to the school, its students and faculty, and against litigation against the schools for permitting or sanctioning publications of such matter.

8. The defendants primary function is to educate the children of this community, and there are certain types of publications which disrupt this function, and/or which are not constitutionally protected.

9. Under the present rules, safeguards of plaintiffs' constitutional rights are provided for.

WHEREFORE, defendants and each of them respectfully

pray that plaintiffs take nothing by way of complaint against them, that their prayers for temporary restraining order, injunction and damages be denied, that this court declare that Rules 11.05 and 11.06 are not unconstitutional, that plaintiffs' newspapers as presented in this case are obscene, indecent, libelous and disruptive, and for all other proper relief in the premises.

BREDELL, MARTIN & MCTURNAN

(Signatures and Certificate of Service omitted in printing)

EXHIBIT A TO ADDITIONAL PARAGRAPH OF ANSWER

Resolution No._____ October ____, 1972

Resolution Amending Rule 11.05 of the Rules of the Board pertaining to distribution of printed and pictorial matter in the schools.

WHEREAS, a question has been presented concerning Rule 11.05 of the Rules of the Board pertaining to distribution of pictorial and printed matter in the schools, and

WHEREAS, it is desirable that distribution of such matter be subject to reasonable limitations, and

WHEREAS, the Board is presently involved in litigation respecting its rules, and has been advised by the Federal District Court that its present rules will be declared unconstitutional, and

WHEREAS, the Board is desirous of fulfilling its obligations to the community to maintain high standards of conduct and learning in the public schools and to teach and encourage the proper use of language, among its students, while at the same time protecting the rights of students in the schools to express their views.

IT IS, THEREFORE, RESOLVED by the Board that Section 11.05 is amended to read as follows:

1. *General.* The following rules shall govern the distribution of literature and other communicatory material (hereinafter collectively referred to as "literature") by students in the Indianapolis public school system (any of whom is hereinafter referred to as "a student") in or upon the School Board's public school buildings, structures

and/or grounds (the term "school" being used, hereinafter, to signify any such building, structure or the grounds of any such building or structure).

1.1. *Distribution of Certain Kinds of Literature Prohibited.*

1.1.1. No student shall distribute in any school any literature that is—

1.1.1.1. obscene as to minors

1.1.1.2. libelous or

1.1.1.3. either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.

1.1.1.4. not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted.

1.1.2. Literature other than literature of the kind described in Section 1.1.1. above, is hereinafter referred to as "distributable literature."

1.2. *Who May Distribute Distributable Literature.* Subject to the provisions of Section 1.3. below, distributable literature may be distributed by, and only by, any student, within any school in which the student is regularly enrolled.

1.3. *Conditions Under Which Distributable Literature May Be Distributed.*

1.3.1. No distributable literature shall be distributed by any student in any school—

1.3.1.1. while classes are being conducted in the school in which the distribution is to be made;

1.3.1.2. in any place other than a place designated by the principal of the school in which the distribution is to be made, which place shall be selected by the principal with a view toward insuring that the proposed distribution will be made without interference with other persons lawfully within the school;

1.3.1.3. in such a way that the place of distribution (or

any other part of the school in which the distribution is made) becomes littered;

1.3.1.4. in such a way that any person within the school can reasonably be made to feel that the distributable literature is being "forced" upon him;

1.3.1.5. in immediate exchange for money or any other thing of value (or for an immediate promise of money or any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature; or

1.3.1.6. unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself.

1.4. *Spirit in Which the Foregoing Regulations are to be Applied.* In the application of the foregoing regulations pertaining to the distribution of literature in the schools by students, principals and other school administrators shall take care to insure that the constitutional and other legal rights of students to express themselves freely shall not be infringed. The spirit in which the regulations shall be applied shall not be a repressive one, but shall combine a respect for the rights of students with an appropriate regard for the maintenance in the schools of the kind of environment that is necessary to the School Board's conduct of its public educational mission in the School City of Indianapolis.

1.5. *Limitation of the Scope of the Foregoing Rules.* The foregoing rules define the conditions under which students will be permitted to distribute literature in the schools. Nothing in those rules is intended to be, or is, or shall be construed as, an indication that the School Board will permit, without its express prior consent, the distribution in any school of any literature or other article by any person who is not a student in the school where the literature is to be distributed.

1.6. *Penalties for Violation and Student Rights of Review and Appeal.*

1.6.1. For violation of any of the provisions of this Rule 11.05 a student may be suspended or expelled by the principal of the school where such violation occurs and the principal or any teacher of the school may take other disciplinary action which is reasonably desirable or necessary to help any student, to further school purposes, or to prevent any interference therewith.

1.6.2. In the event that suspension or expulsion is deemed necessary, the due process provision of public law 162 of the laws of the State of Indiana and the rules of this board adopted by Resolution #1030 shall apply.

1.7. *Severability of Rule.* If any one or more sections, clauses or phrases of this Rule 11.05 shall be declared unconstitutional, such decision shall in no sense invalidate any other part of this act.

EXHIBIT B TO ADDITIONAL PARAGRAPH OF ANSWER

Amended Resolution No. 1034, September, 1972

AMENDED RESOLUTION MODIFYING SECTION 11.06 OF POLICY & REGULATIONS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS CONCERNING THE SALE OF ITEMS OR SOLICITATION OF FUNDS WITHIN THE SCHOOL.

WHEREAS, legal counsel has reported that Section 11.06 of the Board Regulations has been questioned by the Federal District Court for the Southern District of Indiana, that a modification of said rule is advisable to eliminate any possible discrimination among people desiring to sell merchandise or collect money;

IT IS, THEREFORE, RESOLVED by the Board of School Commissioners of the City of Indianapolis that Section 11.06 is amended to read as follows:

> No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, *or organizations of parents and teachers or students whose sole use of*

funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus.

JUDGMENTS, ORDERS AND DECISION:

1. The United States District Court's Findings of Fact and Conclusions of Law is printed in the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Appendix A, page 1A.

2. The United States District Court's judgment, entitled "Entry on Motion for Permanent Injunction," is printed in the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Appendix B, page 5A.

3. The opinion of the United States Court of Appeals for the Seventh Circuit is printed in the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Appendix C, page 16A.

OTHER PARTS OF RECORD:

UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS
VOLUME I

(*Pages 34-35*):

THE COURT: I am inclined to announce the Court is not convinced it is required to appoint a guardian ad litem for one who presents a constitutional issue to the Court. I have some reservations with regard to this ruling, however, but I do find it within me to distinguish a constitutional issue from an issue concerning a monetary recovery where the fund should be preserved, where the immature or minor person should have protection insofar as the conservation of his recovery in his action is concerned. I realize it could well be argued that preservation of constitutional rights are no different than the preservation of rights concerning money. I do believe that the law would allow a greater latitude and take a different attitude to-

ward the preservation of constitutional rights. For that reason, I am going to rule it is not incumbent on the Plaintiffs to be represented by a guardian ad litem. I would expect this issue to be preserved and held for review in the event there should be occasion to have any rulings in connection with this proceeding reviewed on appeal.

(Pages 89-91) Questions 48, 52 and 54:

CROSS EXAMINATION, GEORGE YARBROUGH
QUESTIONS BY MR. CRAIG PINKUS

Q. George, do you intend to write for Corn Cob Curtain in the future if it is revived as a publication? A. Yes, I do.

* * *

Q. . . . In other words, if you only let people write for the paper who were students in the Indianapolis public schools? A. No, we had a post office box where we had put in the newspaper, anyone, teachers, any parents, anybody who wanted to write anything in to the paper and give their opinion on something, or write an article such as classes, or class changes, or concerts, or anything of that sort.

* * *

Q. So that contributions were made to this publication by persons who were not students in the Indianapolis Public School System? A. Yes.

(Pages 105-106):

THE COURT: I think one of the more significant features of this lawsuit to be coming out of this case is the Court's ruling concerning the right of the minors to proceed without proceeding by way of a guardian ad litem. I reflected over that ruling over the noon hour. It is a rather far-reaching opinion. I do believe the Court is correct insofar as the constitutional issue is presented. By that ruling I certainly am not saying that a minor may proceed without a guardian ad litem in a case not involving the magnitude of the constitutional rights that are asserted in this case, and that is constitutional rights under the First Amendment, meaning speech and expression. You may proceed.

In other words, I have in mind what about children of very tender age, 12, 13, 14 coming in through LSO to bring an action. What are we going to be confronted with. This is a pretty important ruling, and it is a very serious matter that we are dealing with. . . .

(*Pages 138-140*):

DIRECT EXAMINATION, JEFFREY JACOBS

Q. Did you decide on any kind of formal organization in your publication? A. We did decide we would not edit the paper. We decided we would have a post office box so anybody, whether they be students, teachers, parents, or whatever, could submit to this newspaper, . . .

* * *

THE COURT: I would like to interrupt. It is your testimony you had no editor as such?

THE WITNESS: Right.

THE COURT: Who made the final conclusion in respect to what would be contained in the printed pages?

* * *

THE WITNESS: We had layout meetings, as such, and just for the purpose of laying out the paper and pasting, and using anything that was sent in, we put in the paper.

THE COURT: In other words, you would print anything that was sent in?

THE WITNESS: Whoever attended these meetings would do this, yes.

THE COURT: You edited out nothing?

THE WITNESS: Correct.

(*Page 143*) *Question 27*:

Q. In your own words will you please describe to the Court the way in which you distributed Corn Cob Curtain at your high school? A. Very haphazard. We would get as many people as we possibly could just to pass them out, and we told them they could receive money for it, then they should give this money to us so we could continue printing the paper, Corn Cob Curtain.

(*Pages 144-145*) *Questions 30, 32 and 34*:

Q. What about the time and place of distribution that you did? A. I distributed at Arsenal Technical High School on the grounds quite a bit, and a lot of the times outside the grounds, and sometimes at concerts.

• • •

Q. Given that, what locations did you take up on those grounds for the purpose of distributing the paper? A. Ordinarily outside the buildings, or in the lunch room sometimes.

• • •

Q. How did you go about distributing papers inside the lunch room? A. Ordinarily, I would just go from person to person and ask them if they would like to buy Corn Cob Curtain.

(*Page 154*) *Questions 81 and 82*:

Q. Tell us basically what happened at the time, what led up to being told you could not distribute the publication? A. Well, first I wanted to make sure there was such a ruling. So I called the School Board, and I tried to reach Dr. Campbell, who was then Superintendent of the School Board, and instead I was given Karl Kalp to talk to, who was Assistant Superintendent at that time.

Q. Would you please relate for us the substance of that conversation with Mr. Kalp? A. Yes. I asked him if such a newspaper was being published and whose judgment, who was the person that was to judge whether that paper could be distributed. And at that time he told me the high school principals, individual high school principals had that authority, to approve or disapprove such a publication. And so then, well, that's about as far as the conversation went because at that time he was not familiar with the paper.

(*Pages 156-157*) *Questions 85 through 91*:

Q. Did the principal tell you at that time to stop distributing Corn Cob Curtain? A. No.

Q. What, if anything, Jeff, occurred after that meeting with your principal on the question of distributing the paper? A. Well, he informed me there was to be a meeting with the principals and School Board administrators the following morning, and that he expected Mr. Kalp to make a decision at that time concerning the distribution of the paper.

Q. What happened next? A. Well, so the next day he had gone to the meeting, I didn't see the principal, but the following day he came to me and told me Mr. Kalp had decided the newspaper was obscene, and the principals were to ban its distribution from the school proper.

Q. As a whole all principals were to take that position, is that correct? A. That's right.

Q. What, if anything, did you do on this matter after that? A. We stopped distribution, and I called Karl Kalp back.

Q. When you say you stopped distribution, that was immediately upon the information being given to you by your principal that Mr. Kalp regarded the publication as obscene? A. Well, it was as immediate as possible. I had to relay the message to other people that were distributing the paper at the time.

Q. Since that time have you distributed the Corn Cob Curtain in any Indianapolis public school? A. No, we have not.

(*Pages 158-159*) *Questions 97 through 101*:

Q. Did he discuss the possibility with you of meeting on the question of the obscenity of the papers? A. Well, I asked him at that time if we could arrange some type of meeting with our school principal and officials, and the school Board and members of the Corn Cob Curtain so that we could discuss what was obscene in the paper, and what was not.

Q. What was his response to that? A. He said that would be fine.

Q. What did you do subsequently? A. I told him I would contact him at a later date as to the date and set up an appointment for a meeting.

Q. Did you do that? A. No, I did not.

Q. Did you drop the issue at that point? A. Yes.

(*Page 162*) *Questions 122-123*:

Q. You have any idea how many copies were distributed? A. Approximately 200.

Q. Out of about how many? A. 3,000.

(*Pages 166-169*) *Questions 138 through 148*:

Q. If the paper were revived what form of organzation would it take; in other words, how would it be operated if it again could be published? A. I think as far as people that work on the paper holding office, it will be operated the same way. Nobody will have control over the paper, editing control or such as that. . . .

Q. Now, Jeff, you heard question raised with respect to the content of these publications, and you have heard the suggest that they are obscene. Realizing you are not an expert in this area, do you have any thoughts at all with respect to the content of the publication? A. Yes, I believe the words they are referring to as being obscene are words that have been taken out of context. A lot of these words are used by people to place emphasis on certain things, and not for reasons of offending anybody.

Q. What about the reasons of appealing to their sexual interest? When you were writing, did you have anything like that in mind? A. No, sir, I did not.

Q. Did you ever use any of these kinds of words in your writing? A. No, I did not.

Q. Did you disapprove of their use by colleagues who employed them? A. No.

Q. Why did you not disapprove of their use? A. Well, I believe that is only fair that they should be using the words they choose in expressing themselves.

Q. Do you . . .

THE COURT: They have no beiter way of expressing themselves. I have always been informed a person who uses vulgarity in their expressions are either inarticulate or illiterate.

THE WITNESS: Well, a lot, well, there is some discrepancy there, I think. A lot of people use this in every day language and there are a lot of people that have opinions that they may be illiterate. But if that is the words they choose to use, well, we choose not to edit the paper, and in any case that means we would not edit these words.

Q. Jeff, did you react by having the sense you were baser nature, if you will, was being appealed to by your colleagues and wrote articles employing these words? A. Would you rephrase that?

Q. Yes, this is a difficult question. Did you think that your friends who used this language which has been objected to were trying to appeal to your baser instincts, that they were using these words to arouse you sexually? A. No, I do not believe so. And another thing is none of my personal acquaintances used any words that could be considered obscene. Most of these words were used by people completely unfamiliar to any of us, and were sent in to the post office box, and that is the way we chose to run the paper.

Q. Why didn't you censor out those articles written by others who used this kind of language? A. Well, there again, it was their choice to use these words for emphasis, and we felt that goes along with expression, and we chose not to censor the words.

Q. Do you think those words were used for any purpose besides emphasis? A. No, I do not. I think these people that used them, I'm sure they didn't have anything in mind when they used the words, other than emphasis because I'm sure that is the way they talk in every day language.

(Pages 171 through 180) Questions 159 through 180 and Questions 182 through 185:

CROSS EXAMINATION, JEFFREY JACOBS

QUESTIONS BY MR. LAWRENCE MCTURNAN

Q. Jeff, I believe you testified that neither you nor any of your friends used these words that could be considered obscene. Is that your testimony? A. That's correct.

Q. Why is that? A. Well, for myself personally I don't

use language like that, especially in articles that go before the people.

Q. And why is that? A. Why is that?

Q. Yes. A. It's my personal feelings I did not need to use words in order to express myself.

Q. Is that the only reason? A. Yes.

Q. It was not any concern for the people whom you are addressing, not any concern on your part you might offend them? A. No.

Q. You have no concern that you might influence other children to adopt and use these words? You have no feelings about that? A. Well, I choose not to use these words. If I don't use the words, well, then a question such as that would be irrelevant.

Q. Well, Tech is a pretty large school, isn't it? A. Yes.

Q. How many students? A. Approximately 5,000.

Q. Do they all know you personally? A. No.

Q. You were one of the top students at Tech, are you not, sir? A. Higher than 50 percent, I guess.

Q. You were on the track team? A. Yes.

Q. You were on the football team? A. No.

Q. I thought you went out for football. A. I played for two years.

Q. But the kids would know, more children would know you than you would know; would that be true? A. Yes, I suppose.

Q. And there would be younger children that would look up to you in school? A. Yes.

Q. And there would be children who would know you were one of the editors or publishers of this newspaper, would they not, if it were circulated? A. They would know that, yes.

Q. And there would be children who in some instances would assume that you approved this type language, would they not?

MR. PINKUS: We object to the question as phrased. It calls for a very difficult conjecture and conclusion on the part of the witness as to the assumptions of unknown people.

THE COURT: I would say that is a valid objection. I would sustain the objection.

Q. Have you ever thought of that possibility? A. Possibility of what?

Q. Influencing younger children that look up to you in the use of these vulgarisms and obscenities, and the effect upon those children.

MR. PINKUS: We object to the question as phrased because the witness has indicated he does not use this kind of language. The question now implies the effect of such usage by the actions and writings.

MR. MCTURNAN: Let me rephrase the question.

Q. Assuming you do not use these words yourself, and assuming further that there are children who know you in school, many of them younger than you and who would know, as you testified, that you were connected with the paper. Has the thought ever occurred to you that some of these younger children might out of their respect for you, their looking up to you, adopt the use of these words thinking that you approved of them? A. I have most likely thought of that, but I think more likely I thought in terms if I did not use these words or anything else that would offend these children you are speaking of, well, then they should not associate me with such offensive language, or whatever.

Q. But you would have no way of assuring yourself of that, would you, Jeff, unless you wrote them in the paper yourself under your signature that you did not approve them and did not use these words? A. In one issue, in fact, we did write and I think this was pretty much a total view of the staff people that worked for the Corn Cob Curtain, that the issues, well, the opinions of—well, they originated with that person alone, and that were not joint opinions of all the people that worked on the paper.

* * *

Q. Now, you stated that you thought, as a matter of fact, your counsel asked you to draw a conclusion that these people you don't know that wrote these anonymous letters were just using them to emphasize to your points.

You were able to testify about that, were you not? A. I was.

Q. Without having conversed with the authors of those articles prior to your testimony? A. Yes.

Q. And that would be guesswork on your part, would it not? A. Yes.

Q. Now, you testified—strike that. I have excerpted from your various publications a few pages, and I want you to read a few passages. Then, I want to ask you some questions.

MR. PINKUS: We object, Your Honor, to this entire technique, which is long being discredited in the, to determine whether a matter is obscene. It is long established on this issue that passages may not be selected and read out of context in an attempt to embarrass or cause any kind of change and demeanor of the witness. . . .

• • •

MR. MCTURNAN: English Courts, as pointed out in my brief, recently handed a landmark decision, difference between newspaper and books with regard to looking at the entire publication to determine its obscenity. English Courts have held a man may be imprisoned for specific articles in a newspaper which are obscene, whereas they still adhere to the rule of viewing an entire book to determine its central theme. . . .

My point here is a newspaper, this is a very sound opinion and developed in jurisprudence, is a series of unrelated articles. We all know from our own experience we read a few select articles in the newspaper each day, and that the impression created by each article is the impression that we take away from that newspaper. It is not an overall impression as to whether the newspaper is good, bad or interesting. It is with regard to each specific article which we remember out of context of the entire newspaper. In addition to the Ginsberg rule with respect to minors as the three conditions.

One, if it appeals to prurient or morbid or shameful interest of the minor. I want to see what reaction the reading of this has upon this young man. Counsel has put his finger on it, that he will be embarrassed, embarrassed

synonymous with a shame. We may be getting to the heart of what is obscene when it comes to minors. I think it is very significant how this young man reacts to this and how he answers the questions I intend to ask him after he has read it.

THE COURT: I am going to overrule the objection. Now, I am impressed with this distinction drawn between determining whether a book is obscene in a legal sense as distinguished from a newspaper article. I think there definitely is a difference to be drawn between a newspaper, if this is a newspaper, and a book.

• • •

MR. PINKUS: We wish to make one additional comment, that is, the capacity to embarrass this young man, which is entirely novel and greedy in the concept counsel views obscenity. He already indicated he personally does not choose to utilize these words. By compelling him to read these words, we're going forward in an act, which is sheer calculated embarrassment for a person who already states he doesn't employ this language. It doesn't go to the reasons other people employ this language.

THE COURT: He is the main Plaintiff in the action, and one of the leaders, from what the evidence establishes up to this point, in purveying this publication. The Court will overrule the objection.

(Pages 183-184) Questions 188 through 200:

Q. Now, referring back to your earlier testimony on direct examination and again on cross examination, that you felt people who wrote these things in just tried to emphasize a point. This last article you notice seems to be rather calculated article, rather than blunt article, did it not? A. Excuse me, I did not write that.

Q. I'm not talking about your writing. You were discussing what these people meant who wrote in the articles and their use of words. And I thought at one time you were in agreement they were short of vocabulary and were trying to use these words to express themselves. A. Yes.

Q. Getting to the last sentence you read, you think that

would be the case? A. What is that last sentence, please?

Q. "Number of freak girls screwed." A. I believe that this is pertinent to the article, because I believe the article was a sarcasm, and not to be taken seriously.

Q. It wasn't, wasn't written by an intelligent person? A. No.

Q. Or a person who lacked vocabulary, you wouldn't say that, would you? You say, "The editors of the Curtain have devised a system of points to determine, not only who is a hippie," et cetera. That is perfect grammar, and they use considerable number of words, correct? A. Yes.

Q. You say you didn't write it, but this is all intent and purpose from reading it, seems to be an idea of the editors, is that correct? A. I believe the person that wrote it was at the time helping the paper.

Q. One of the editors? A. Actually, we did not have editors.

Q. Now, how about the cartoon? A. How am I supposed to answer that?

Q. You said that you knew the person who made up this cartoon. Who was that person? A. David Alley.

Q. Did he like the principal? A. It was, there was nothing in the cartoon that was directed at any one principal.

Q. This was published on the Tech campus, wasn't it? A. No.

Q. It was directed to all principals? A. I have no idea what his intentions were.

(Pages 188 through 193) Questions 227 through 230; Questions 237 through 243; and Questions 253 through 261:

Q. . . . Do you know what "prurient," p-r-u-r-i-e-n-t means? A. No.

Q. You know what the word "shame" means? A. Yes.

Q. Would you give me an example, usage of the word "shameful"? A. Oh, I suppose a woman that would prostitute her body would be an example of a shameful act.

Q. That would, I suppose, register upon your shameful interest, if that is the way to say it. A. Yes, I believe so.

• • •

Q. . . . Now, what is your reaction when you are placed with somebody in a situation where you cannot remove yourself from them, who uses this type of language, four-letter words? A. It upsets me.

Q. Does it embarrass you? A. No, I don't believe so.

Q. It just upsets you? A. Yes.

Q. Then you are uncomfortable until you leave his presence, I assume? A. Yes, if they are being loud and aggressive about it, yes.

Q. Suppose he were soft and non-aggressive about it, but if it was continued, continual flow? A. I most likely wouldn't associate with such a person.

Q. It would make you uncomfortable, however, would it not? A. Excuse me?

Q. That would make you equally uncomfortable, would it not? A. Yes.

• • •

Q. You kept the names anonymous in many instances, did *not* not? A. Well, that was a choice of whoever wrote them.

Q. But you make it plain in the paper they would be protected, did you not? A. I don't recall.

Q. You don't recall you had an ad in there that said "Your name will be protected"? A. I don't recall.

Q. You're not saying you did not? A. No.

Q. Now, you asked for a hearing with Mr. Kalp and some of the other administrative staff, did you not? A. Yes.

Q. And he said, Fine? A. Yes.

Q. You didn't follow that up? A. No.

Q. That was your choice? A. Well, yes, after I discussed it with friends and well, Sal Lowenstein, who I referred to previously.

Q. He told you not to go in and talk to the school? A. Yes.

(Pages 196 through 198) Questions 279 through 281:

Q. During the time you were publishing this newspaper before it was barred, do you of your own knowledge know of any discrimination practiced by the coach at Tech High School for the ball team?

MR. PINKUS: We object. The term "discrimination" is undefined. It has several possible meanings.

THE COURT: Overruled.

Q. Discriminated as used in your newspaper.

THE COURT: Overruled.

A. Yes, I felt there was some discrimination.

Q. With regard to what? A. Myself as one. I had played for two years, and most of that time I played second string, and a lot of, well, I was often criticized for my hair length the second year I played, and I was harassed, well, not harassed, but told off by the coach I would have to have my hair cut, which I did so three times. And a lot of other times I would be either sitting on the bench or out playing parttime just because—and I felt because it was for that reason.

THE COURT: How long was your hair?

THE WITNESS: Probably a little bit—after the third time I had it cut it was no longer than what it is now.

THE COURT: Before the first time?

THE WITNESS: Before the first time, oh, two or three inches, I felt at the time was—I combed my hair in an Afro hair-style, which I'm sure you are familiar with, and it was no longer than the other Caucasion boys that played football, but I think it was because I combed it differently.

(Pages 209 and 210) Questions 324 and 325:

Q. The article that goes into points or judging what a hippie is. A. Yes.

Q. Will you just explain to the Court why you regard that as a joke? A. I only said that because I think you would have to be pretty ignorant to take that seriously, that article, because it was totally ridiculous. But it was meant to be such. If anything, it was in criticism of people that would take such as serious; and I think that means the obscene matters that were involved also.

(Pages 212-214) Questions 340 through 349:

Q. What kind of literature have you found those words used in? A. Well, all types of literature from, oh, I suppose religious newspaper or Jesus Freak newspapers, as you might term them, on to communist literature, any type of newspaper such as that.

Q. Did you ever see these words used in novels? A. Yes, literature.

Q. Have you seen these words used in nonfiction books? A. Yes, and many that I admire.

Q. Can you name any of those books? A. I just recently read Catcher in the Rye, which makes quite a bit of use of such language, and it's supposedly an excellent novel.

Q. When you read the words that we are all talking about in Catcher in the Rye, did you have an emotional reaction of any kind to those words? A. Nothing that upset me. It just further expressed his views.

Q. Did the words seem inapproprate to you? A. No.

Q. Did they offend you? A. No.

Q. How did you happen to be reading that particular book? A. Well, Susan Chandler, who is also a plaintiff in this case, advised me to read it. She said it was a good book.

Q. Do you think those words were used in that book solely for emphasis? A. Yes.

Q. And that didn't offend you? A. No, it did not.

TRANSCRIPT OF PROCEEDINGS
VOLUME II

(Pages 237 through 239) Questions 26 through 37:

DIRECT EXAMINATION, SUSAN CHANDLER

Q. Now, Susan, in any of the articles which you wrote did you have occasion to use any four-letter words or vulgarisms to which Jeff Jacobs had testified yesterday? A. No.

Q. And did you know that there were such words that appeared in the Corn Cob Curtain? A. Yes, I did.

Q. And did these words offend you in any manner? A. No.

Q. And in the context in which they appeared, did these words or terms offend you in any manner? A. No.

Q. Have you read any novels or publications which have had similar words as those which have been challenged here yesterday? A. Yes.

Q. Would you please describe to the Court the novels, or books, or publications in which such words appeared? A. Well, there is quite a few out now. I can just remember some other people talked about a lot, like Catcher in the Rye, Catch-22, Godfather, and there's probably a lot more.

Q. And were you given these books by anyone? A. Yes, I got them from Mom's library.

MR. MCTURNAN: Where?

THE WITNESS: From my mom's library or collection.

Q. And your mother is employed? A. Yes.

Q. What is her position? A. She's a history teacher at Eastwood Junior High, Washington Township.

Q. And your mother provided these books such as Catcher in the Rye, which contain such words? A. I don't know if Future Shock, but she supplied them for us, yes.

Q. And read in the context in which these words appeared, four-letter words and other vulgarisms, to which defense counsel has referred, did they offend you? A. No.

Q. And in the context in which these words appear, did they in any manner upset you? A. No, they didn't.

(Pages 244-245) Questions 64 and 70:

Q. . . . For the issues on which you worked, where did you distribute the newspaper? A. Well, I usually tried to sell after the end of my schedule off school property.

* * *

Q. And what would be your distribution of newspapers, if you were permitted in the future? A. I would probably continue to sell after school on the sidewalk a block or two away.

(Pages 248 through 251) Questions 78 through 82 and Questions 84 through 87:

Q. I believe I understood you correctly, Susan, that you don't use any of these four-letter words yourself? A. I never used them in any of the articles I wrote.

Q. Why is it you have never used any of these words? A. They weren't necessary for my articles.

Q. Do you have any origin in your family trait? A. Pretty much so. I think people that use those, usually learn them at home, and we never use them in my home.

Q. That is not a part of the language in your household, is that correct? A. No.

Q. Do you think that is proper to exclude from your household conversation that sort of language? A. I think so, although I suppose you could say it was a matter of taste.

* * *

Q. I believe, Susan, where we left off was that you were describing your family and the type of communicative language that is used which excludes these four-letter words. I believe you said you approved of that type of communcation, exclusion of the use of four-letter words. Is that right? A. Yes.

Q. And would you disapprove the use of four-letter words in and about your home, having in mind your present feelings in that regard? A. No.

Q. You would not? Do you do it? A. Occasionally, but I think everyone does.

Q. Do you speak to your mother and father, the use of four-letter words? A. Not very often.

(Pages 253 through 255):

THE COURT: I feel, Mr. Turnan, that you are actually expounding the issues here to be tried far beyond what this Court is called upon to decide. . . .

* * *

THE COURT: . . . And I do not feel for the purpose of the present proceedings, and I doubt seriously for the purpose of the lawsuit, the Court is required in making its ruling on the relief sought to determine whether this publication is, or is not obscene, or whether it is libelous.

(Pages 260-261) Questions 99 through 101:

Q. So in the main then, the use of these words is by people who are not Plaintiffs in this action, is that not correct? A. Yes, that's correct.

Q. People who write in letters? A. That's what's been said.

Q. Were any of those people given an opportunity to be Plaintiffs in this case? A. Well, the people that wrote in usually we didn't know them.

(Pages 268-269) Question 140:

Q. . . . Does your approval of four-letter words depend on the context in which they appear? A. Yes.

(Pages 299-300) Question 18 and Questions 20 through 24:

DIRECT EXAMINATION, KARL KALP

Q. Have you had problems of salesmen frequenting the campuses? A. Yes.

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Q. Now, what have been some of the effects upon the education system of solicitors who come into the building? Give some examples. A. Yes. We have a readily available market for anyone who wants to purvey something to solicit people. We have a number of requests each year for people to go into schools to attempt to sell items to either the members of the faculties, or in some cases to the students. The usual procedure is to attempt to create a demand, frequently offer to give prizes or anything else to get themselves in the schools so they can have access to that market.

Q. And that is a strong desire, I assume, on the part of salesmen, to come in and talk to teachers? A. Very much so.

Q. And have you felt, or in your opinion is it necessary for the continuing function of education in the schools that this be limited, and screened? A. Absolutely.

Q. And do I understand you then, you discourage all solicitation at the schools? A. That's correct.

Q. Now, let me ask you if you have ever had experiences with newspapers in the past, pre-dating Corn Cob Curtain that were for distribution on the campuses? A. Yes, there have been previous, sporadic attempts to distribute papers of this type.

(Page 305) Questions 38 through 40:

Q. I will hand you what has been marked Defendant's Exhibit I, and ask you what that is? A. This is a copy of the Back Door Press, and was distributed at Manuel High School some several months ago, but more recently than some of the previous ones you showed me.

Q. Have all these papers at one time or another been present on the campuses of the high schools? A. Yes.

Q. And prevented from at least sanctioned distribution? A. Yes.

MR. MCTURNAN: At this time we now offer into evidence Defendant's Exhibits I, H, G, F, E, and J.

(Pages 311 through 328) Questions 57 through 61; Questions 63 through 86; Questions 88 through 118; Questions 120 through 121; and Question 123:

Q. Now, Mr. Kalp, what was your ruling and decision in each instance regarding those documents? A. That those documents could not be distributed in schools, or on the school grounds.

Q. Now, with regard to the Exhibit put out by the United Klan, apparently, based upon your experience as a teacher, administrator and superintendent in the Indianapolis city schools since 1948, do you have an opinion as to whether a publication such as that, if it reached one of your campuses, whether or not you might reasonably anticipate violence to erupt?

* * *

A. It is my opinion that those materials would create a rather considerable disturbance, and our experience, we had a brief experience previously with this, was it spilled out into the greater community very rapidly.

Q. Have you recently had in the last year or two some instances in your schools, yes or no? A. Yes.

Q. Will you tell us about some of them? A. We have had considerably more incidents than can be attributed, I think, to the time prior to a few years ago. There is a heightened tension on high school campuses; there is apparently a greater readiness to react, normal exuberance of high school students comprising population of

some 13 to 20 years old, apparently reacts more readily now. I have my opinions as to why, but nonetheless, we have had incidents of fighting, rather large scale disorders, attempts at arson, arson.

Q. What school have you had that problem at, or would you rather not isolate any particular school? A. I would rather not even describe the incidents.

* * *

Q. Have you in the last two years seen a situation where the teachers, administrative staff have lost control of the schools in Indianapolis? A. Not entirely. I think we . . .

Q. Explain that. A. Yes. We have had occasions where students would take over temporarily, cafeteria for example, or create a rather considerable disturbance in an area. Only on one occasion has the situation been such we felt it necessary to close the school for a portion of a day.

Q. What promoted that, do you know? A. Rather extensive fighting among students.

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Q. Is it, or is it not a fact that these matters sometimes occur as a result of a very minor incident at the outset? A. Yes. I was about to say that I doubt that there is one specific incident which causes the entire outbreak. It's probable that it's more nearly accumulative effect, with the possibility of one relatively minor or major incident touching it off.

Q. Now, when the Corn Cob Curtain came to your attention, did you have reason to believe in your opinion that it could cause a disruption in the schools? A. Yes, I did.

Q. Would you elaborate on that? A. Yes, I think I described the situation which has existed in our, well, primarily in our high schools, and given the potential for reaction among the student body, anything which tends to add to that could certainly reasonably be expected to result in a disturbance, or to add to a situation which was already building up from some other source.

Q. The fact the paper is unedited and receives letters from unknown sources cause you any reason as administra-

tor to be apprehensive about disruption caused by the paper? A. Certainly to my apprehension.

Q. Why is that? A. There is absolutely no way of knowing what kinds of responsibility are imposed; there are no restraints. Anything could be published and distributed, that appealed apparently to anyone, whether the person is emotionally disturbed or has some purpose intentionally to interfere with the operation of the schools.

Q. Do you have some emotionally disturbed children in the Indianapolis school system? Yes, we do.

Q. What are the ages of the children in the high schools in Indianapolis? A. Probably from a minimum of 13 to maximum of 20. We occasionally have older students, but not frequently.

Q. Do the younger children still look up to the older children? A. Yes.

Q. And try to emulate them? A. Quite frequently, and the school system attempts to develop leadership among the older students.

Q. Are you familiar with the record and background of some of the Plaintiffs in this case? A. Only as has been developed through this case.

Q. Would you say from listening to the testimony they would qualify as, they would probably be thought of as, among the students as more or less in the leadership class? A. Yes, I think this is obviously true with respect to the older students. And, that the usual tendency is for younger students to respect them and emulate them, and attempt to follow their direction.

Q. You observed one of the young men on the track team? A. Yes.

Q. Handsome young man, have you not? A. Yes.

Q. You observed also young lady, a very pretty girl? A. Yes.

Q. Is that a factor in student emulation among the younger students? A. Yes, obviously people who are physically attractive are, have better leadership and potential.

Q. And they obviously are all pretty good students? A. They do appear to have had better than average academic records.

Q. At the time you made the decision not to permit the paper to be distributed any longer, had there been some incidents not too far related in time? A. Yes, and particularly at Technical High School, which is where the request originated.

Q. How many students were at Tech? A. Approximately 5,000.

Q. Ranging in age from 13 to 20? A. Yes.

Q. Would you say at that time the situation was somewhat unstable at Tech? A. Yes, I think that is a fair characterization.

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Q. Have you observed the cartoon about the principal being blown up in the rest room area? Yes.

Q. Would you give us an opinion as an educator as to whether or not there was a possibility at the time these publications were offered, as to whether some child, whether he be having emotional disorder or not, might be incited to do something in the school as a result of observing this cartoon, and as a result of having in mind some of the leadership students in the school paper and publish it? A. Yes. I think it's very obvious. We had a demonstration yesterday. One of the witnesses who said one of the lists in there was a joke. It later developed he approved of all those things he described as a joke. I think given individuals under variety of circumstances react differently to cartoon. If the cartoon happened to appeal to something they feel at the time, this can be used in their own liking to strengthen and support whatever kind of behavior they feel appropriate.

Q. Do you frequently have behavior in your schools among children that you cannot explain? A. Yes, frequently at least in terms of the number of happenings. I don't think it's frequent with respect to the percentage of students and behaviors.

Q. Are you always able to anticipate what children are going to do? A. We certainly are not.

Q. Is it always something very serious that sets children off in these disruptions and confrontations; is it always something of a very serious nature? A. If it is, it certainly isn't discernible.

Q. It is not a significant thing that sets things off? A. That is correct.

Q. Do you know of any discrimination by the high school coach at Tech among seniors, or other students? A. No, I know of none. None has been reported to me. I have read the rebuttal that appeared in the Arsenal Cannon.

Q. By whom was that written? A. Members of the football team, some members of the football team.

Q. And they rebutted the article? A. Yes.

Q. Do you know the Tech football coach? A. Mr. Bell, yes.

Q. Do you know his views on discrimination? A. I think I do.

Q. What are they? A. I think Mr. Bell has worked at Tech for probably some 15 or 20 years, and to the best of my knowledge there has never been anything that could be attributed to him as a discriminatory act. We are using the word rather loosely. Obviously, I hope he does discriminate between those players who are good, and those who are not so good, and plays the better player.

Q. You know what I'm talking about, in terms that appeared in the Corn Cob Curtain. A. Yes.

Q. Now, in your opinion as an educator, having in mind some of the issues of the day, would it be damaging to a coach in his profession if he were labeled in this city, and he was accepted as a person who discriminated racially among his players? A. Not only as a coach, but as a teacher.

Q. What would happen to him if he were under your jurisdiction as one of your employees if he demonstrated or advocated such a philosophy, Mr. Kalp? A. We would be required to take some disciplinary action.

Q. And you would do what? A. We would either relieve him of his coaching duties, if that is where the only discrimination existed. If it existed in other areas, we would have to relieve him of his duties also.

Q. In other words, it would be a very serious matter? A. Extremely serious.

Q. And when you viewed this article about your coach at

Tech, did you consider it as a serious allegation? A. Well, serious enough to ask the administration if there was any evidence to support it.

Q. You did follow that up? A. Yes, we may be hypersensitive to allegations of discrimination, but those are the conditions now.

Q. Was a check made with football players? A. Yes, through the administration there.

Q. And then in turn some selected football players wrote an article? A. That is correct.

Q. Now, do you have any problems in your school system about maintaining quiet, and I am departing now from the situation of violence. I am talking about quietude in general. Is that a problem, more than it used to be? A. Yes. And I think obviously there is always some problem of maintaining a reasonable sound level, given concentration of students you have about a relatively confined area. And I think it is safe to say, and rather observable, it has been coming along rather widely of the various publications, the whole area of tendency toward unrest in schools have increased.

Q. With that particular thought in mind, directing your attention to that area of our discussion now, I would like you to give me your opinion, if you have one, as to what would occur, would have occurred, reference that situation, had permission been given to distribute the Corn Cob Curtain in all of the schools? A. I think undoubtedly there would have been an increase in the number of students who received the paper through purchases, contributions, or whatever. The information contained in the papers certainly would appeal to at least the younger students who haven't become quite as sophisticated yet in their handling of some of the language that is in there. I'm sure that is the thing which would appeal to them the most because that is the thing which they probably had less ready access to. The other kinds of material which was in there was rather humdrum and probably isn't going to have that much appeal to generally ninth and tenth grade students. My experience has been that the distribution of materials are, for that matter, it takes very little to set off minor flurry

of excitement among younger students, at least, and cause quite a bit of conversation among them, heightened interest which spills over into classrooms, and then there is a lot of tissue showing latest information to the other students in the class. I think a general lack of attention to the instruction program the teacher is representing.

Q. Do you know what would be the effect, do you have an opinion as to what would be the effect of the distribution with the sanction of the school, or with the permission of the school of the Corn Cob Curtain with content similar to what you found to be offensive?

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A. It's my opinion it would be offensive to a majority of the students, and the parents of those students in this community.

Q. Would it be embarrassing to many of the students? A. Yes, I'm sure that it would be.

Q. Now, what in your opinion would be the situation if after months of distribution, and it became generally known that the administration permitted this type of commentary, and provided a place for its dissemination? A. I think the obvious reaction would be a lowering of the respect of the school by the patrons, a continued deterioration of morale of teachers. I think we accept as one of our goals the upholding of community values and standards, and I think it is pretty difficult, if not impossible, for teachers to do that when confronted by counter-movement on the part of the administration that functions with the sanction of the administration.

Q. How about—what does the word "desensitize" mean to you as an educator? A. It means the removal of sensitivity to whatever is in question, and this would certainly happen. I think there is ample evidence in sociological and psychological study, people can be desensitized to almost anything, particularly language. A word can be repeated until it loses all of its original intent, purpose and meaning, and this can be expanded into a number of other areas, and this is obviously a deterioration of the values and standards of a community. This

gets to be a rather sophisticated study, and can be extended, too, from an intellectual to a physical level. And I think there are numerous occasions this having happened. The classic ones are in the purges and what not that occurred in Germany and Russia that were finally accepted. Desensitization, to me, refers to that kind of activity which can be very simple, but very pervasive.

Q. And when you become desensitized to the word, then is it possible to become desensitized to the act represented by that word? A. It's quite possible.

Q. Do you feel that there is any social purpose served by the dissemination of this paper in its entirety, having in mind the four-letter words that it contains?

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A. As it exists, I think the detrimental qualities are the only ones which I see. I see nothing socially redeeming about it. I can see no purpose for it; and I think if it were distributed with the approval of the administration that the general attitude of the community would be reflected in lack of respect for the administration.

Q. Do you have an opinion as to whether, perhaps I've asked you this, as to whether or not the four-letter words, and the cartoon, and the test to be a hippie is such that it dominates the entire publications, that sort of language dominates the entire publications? A. That's the only part of the publication that isn't available to the students in a much better form than other publications. Book reviews and poetry, that sort of thing are, I think as Mr. Pinkus mentioned, very commendable effort at literary work on the part of the students. But, as he also admitted are not very refined efforts.

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Q. . . . Now, what would be the effect upon the principal in a school upon seeing a document such as the one showing yourself blown up. Would he identify that, if distributed in his school as meaning him? A. Yes, and I assume that is what it was intended to be.

Q. And I assume all the other students would think so, too? A. Yes, they have a principal.

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Q. I will just ask, if he knows—do you know the attitude of the great majority of teachers and principals in this community respecting the type of four-letter words, the chart to be a hippie, and the cartoon of the principal being blown up? Do you know what that attitude is? A. Yes. Let me say this, those administrators and teachers who have contacted me have all been negatively impressed by it, and feel that this is a—something which can continue to lower morale in teachers. I have not yet been approached by someone who felt it was a desirable publication.

(Pages 348-349) Questions 71 through 75:

CROSS EXAMINATION, WALLY POTTER

Q. Do you recall the substance of that discussion with Mr. Reed? A. Essentially, one of the things that hasn't been mentioned was that our former Superintendent at one time, Mr. Reed reported this to me, discussed with him this particular type of publication. And he basically, according to Mr. Reed's comments to me, advocated we not—there again, over-react on items of this type, which I previously mentioned. And I'm sure that part of our discussion related back to that comment.

Q. Are you using the word "over-react", Mr. Potter? A. Well, to by your action cause a more serious disturbance than the situation that is existing at the time.

Q. So, on the basis of your information about an alleged conversation with a former administrator of the school, you decided, did you not, to take no particular action with respect to Corn Cob Curtain, at least for the immediate period after you learned of its existence? A. Yes, sir.

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REDIRECT EXAMINATION, WALLY POTTER

Q. Did you hope it would go away? A. Yes, sir.

Q. Had that occurred with other matters before where you hadn't over-reacted? A. Yes, sir. Let me qualify that. To my knowledge it had occurred before and gone away.

CORN COB CURTAIN, PAGES 14-15—EXHIBIT B OF COMPLAINT:

TECH FOOTBALL IS IT THE COACHES?

I've played football since Jr. High School and it really meant a lot to me but now I can take it or leave it. This just happened this year. I had always been told not to go to Tech to play football because the coaches do you wrong. Some of the coaches have discriminated against blacks. I've known this since I was a freshman but I wanted to prove them wrong. Mr. Kootz, asst. football coach last year, really put pride in me taught me the meaning. I really loved him for this but all he has taught has been torn down by the coaches this year.

TECH'S HEAD FOOTBALL COACH DESTROYS DESIRE OF PLAYERS!!!

On August 15, the first day of football practice the Titan boys had a strong desire to have a ten and zero year. Their desire hasn't changed one bit but their willingness to work for a winning season has dropped considerably. The head coach, Carlos Bell, in my opinion is the reason for the sudden change in spirit. He chooses his favorites and works consistently with them even though there are replacements on the bench that could be of equal performance or better if they were only given an equal opportunity. Mr. Bell says he is being fair, I disagree. I know one player he uses in some games and in others he tells him he is too small. There are others he discriminates against because they aren't "yes" men and say "yes sir" and "no sir" all the time. This is not fair. The team morale is poor because the handful of people he discriminates against are seniors, some lettermen and others, the morale builders when the morale is built. It always amazes me how a coach can find a replacement for a starter when he isn't at practice or he is ill, but the replacement isn't good enough to start in the following game, even though the coach says if you miss practice you don't start. Another reason the team spirit isn't as it should and would be, is that Tech's headcoach has been around as a coach (not headcoach) for 18 to 22 years and feels that he can coach every group of boys as he did every group in the past. This isn't true since the

players personalities vary from year to year. Tech, no doubt has the material to have been no 1 in the state if they were only given a coach. When something goes wrong the coach alibis for it and he shouldn't. Still another reason Tech's team isn't up to power is that the coaches are very rarely in agreement. To have a good team you have to have togetherness in the players and the coaches so you are like one big family, and this is something that Tech doesn't have.

A Tech Senior pulling for the team.

One of the biggest problems this year has been favortism in all sports. But the main issue is football. It seems that Tech's football team is loaded with ability rangeing from running backs to defense backs.

There's a number of seniors who had seen a great deal of action last year but hardly any this year. Is it a lack of ability in the players? or the coaches? or both? or just—(indecipherable).

There are many athletes who quit football at Tech after one or two years, including myself. Their reasons for quitting had nothing to do with their desire to play or their ability. The coaches are just not interested enough in making football a desirable thing.

The coaches cannot run a team with the idea that complete discipline and all hard work will make it succeed. This is exactly the tactics they used that made so many capable individuals quit the team. It's not only those that quit, but Tech has an enrollment of nearly 5,000; and yet the coaches don't do anything to try and get potential athletes into football. Tech can rebuild its football team if the coach will make it seem less like a personalized war and instill more of the spirit of high school football.

When I was a member of the Tech football team, I didn't have a very good attitude toward the coaches and the idea of playing for a winning football team. I felt that if I did not start, the coaches didn't know what they were doing. I was wrong. It took me four years to learn that I, and anybody thinking they are over the coaches head, are dead wrong. They say that the coaches do not play the right people, he's prejudiced, he's outdated, and he's pigheaded. They might even say he is inhuman. Well this may all be

slightly true except the letter. If he makes these mistakes he's nothing but human. The athletes should realize this. I am not saying they are entirely wrong but that they, by argueing who is right and wrong, are destroying Tech's Athletic Program. When a coach says, "Hell! youre nothing but a sissy." The football player should instead of mopeing say "Hell!! I'll show you." If this kind of never-give-up attitude prevails at Tech, sports will become a lasting spectacle instead of a boring bunch of "who's fault is that".

A growing young man.

At the start of this year, the newspapers and other observers gave Techs team a fair rating. With several of the best backs in the city, the team was to be built on speed, and were to bring victory to the team. The schedule has not been hard, but still Tech can't easily win. The veterans of the squad, a few seniors are still on the team, should contribute enough to stir a win, but a few of these are sitting on the bench after three years of dedication. Could it be that the teams failure is due to something other than the players? It may be the coaches!

Two former Tech footballers

Remarks have been made about the CCC criticism. The articles about the football teams were not written with no objective in mind. We would like to see results and for the proper authorities to at least investigate the matter.

Although there are only several peoples' *views* printed here, we have not been one-sided The sentiment expressed here seems to be shared by the majority of past and present Tech football players.

The Arsenal Technical high schools football team is 3-4-1. Compared to last year, this is good, but in my opinion with the perso*nel* this high school could have and the perso*nel* we've got, I believe something is wrong with the coaches. We should have the biggest line in the city, and in my opinion could have if not for the coaches. One of the biggest boys in the school quit the team one year recently because the coaches wouldn't get him some shoes. To beat all, out of the players we've got, some of the best don't get to play. Something must definitely be done. And as a beginning, new coaches!

Is the school supposed to impress us or repress us?

Good question. From the time you were old enough to go to school, the facts have been pounded into your head that your teacher is always right. Where the hell this idea comes from I assure you I don't know. We sit in our little chairs and look interested and listen to the teacher's lengthy explanation of why potatoes cost more in Alabama while we're actually sitting there writing obscenities on the desk. Education—bullshit.

Who Are You?

"Man is willing to accept woman as an equal, a man in skirts, as an angel, a devil, a baby-face, a machine, an instrument, a bosom, a womb, a pair of legs, a servant, an encyclopedia, an ideal or an obscenity; the only thing he won't accept her as is a human being, a real human being of the female sex."

D. H. Lawrence

Who Are You?

I'm a baby dressed in pink . . . Oh, look at how soft and feminine she is, so quiet and good. Not at all like her mischevious brother who screams and kicks and forever gets into things—the death of his mother and the pride of his father. Yes, she's everything a little baby girl should be.

Little tomboy, climbing trees and building with Erector sets—that's me. And that's me, finally passing through my phase, picking up my doll to play house. Let's have a tea party.

Frustration tugs at the back of my mind. Mother makes me help with the housework and learn to cook ("But it's good practice! You want to get married someday, Don't you?") while my brother is allowed to play. Changes are taking place, and I feel disgust with my body for a week every month. It's horrible to be a girl. Oh God, I wish I was a boy.

I want to go to college, "Yes, an . . . (undecipherable) . . . a perfect place to find a husband!" No one seems to understand. I want to learn, grow, live, be a person"! But I'm lonely and alone. To most women, I'm some strange chick or a competitor for their man and therefore a potential

enemy. To a few, I'm a sister who knows and understands, and with these I find solace in our common suffering. To the men, I'm a number of things: a Miss or a Mrs., a pushy bitch, a lady on a pedestal a baby machine, a piece, a potential mother of their children and a combination cook/maid/laundress/slave, or somebody's sister or daughter or old lady.

Maybe someday, somewhere, I'll be somebody's equal. Maybe someday, somewhere, woman will cease to be the nigger of the world.

"Remember the dignity of your womanhood. Do not appeal, do not beg, do not grovel. Take courage, join hands, stand beside us, fights for us."

—Christabel Pankhurst (English suffragette, 1880-1958)

CORN COB CURTAIN, PAGE 19—EXHIBIT B OF COMPLAINT:

A question which usually pops up that no one really knows is an exact stereotype for: Who is a Hippie?

The editors of the *Curtain* have devised a system of points to determine, not only who is a hippie, but to keep with the Amerikan tradition of prestige, competition, and clique statis, it shows who is more of a hippie than another. Hence: the following is a list of Hippie Points. Those who disagree with this system may appeal to Abbey Hoffman (Chairman Hippie) or the *Curtain*. A total of 100 points qualifies you as a hippie.

Anti establishment rap	madnatory
Long hair (collar length or longer)	madnatory
Hair length each additional ½ inch	15 points
Blue jeans	10 points
Army jacket	10 points
User of marihuana	25 points
User of hallucinagens	15 points
connesieur of rock music	madnatory
rock music records	2 points/e
Long distance hitchhiking	1 pt/10 mi.
Wire rim glasses	10 points

Attender of demonstrations	10 points
Draft Evador	100 points
Getting busted	50 pts./bust
Hocking Corn Cob Curtain	30 points
Draft Card burnings	45 points
Flag burnings	75 points
Black light	10 points
Psychedelic opium den	25 points
Patron of Sears underground shop	10 points
Number of freak girls screwed (Undecipherable)	5 pts./girl

CORN COB CURTAIN, PAGE 21—EXHIBIT C OF COMPLAINT:

ON YOUR ASS

First of all, I would like to start this paper by stating: Opinions expressed herewithin, this and all other articles, are not necessarily those of the Corn Cob Curtain, nor are they of the staff. Staff, a loosely applied term identifying those responsible for the publication of the paper. Originally intended, Cob was meant to be a means whereby people relevent to high schools or education in general, might voice their opinions or express their ideas and beliefs, in written form for all the public to see.

From the multitude of participation from all the Indianapolis area high schools, it has become apparent, and no other conclusion can be drawn, that the majority of the students or faculty or administration have no ideas, opinions or beliefs relevent or not. Also justifiable to say that they are completely satisfied with the relationship existing between the faculty, the administration and themselves.

Some of you are so one-sided in your attitudes as to accept anything pushed upon you by the administration. This is not to say that the administration in reality is organized for the sole purpose of destroying your individual-

ism. Some form of authority is necessary, thusly so it deserves respect. Inversely true is that authority should not be all powerful.

It should have specific guidelines for carrying out its authority. These guidelines should be made by the people having to live with them.

The administration heading the schools is also one sided in their views. Blame for this cannot be laid soley to the establishment, for it is made up of individual persons. Teach individual has some fault.

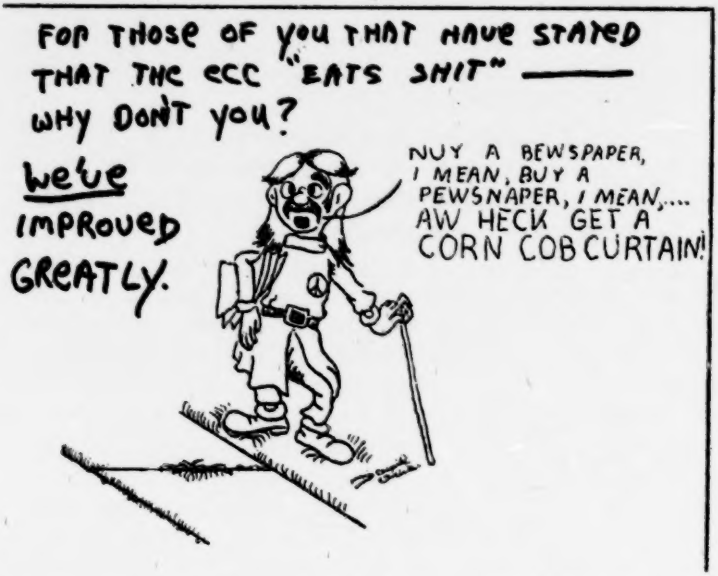
Secondly some of you have realized the screwedupness of these certain individuals who carry out their own beliefs, ideas and philosophies under the guise of being the authority. Still there you sit in your ego-bricked ivory-towers and do nothing. In defense of yourself you say "How can I do anything?"

Here is your chance. Right here, this paper. That's right, lack of participation has let most of the work of the peper fall into a group of less than one-dozen or so persons. It is up to you to devise a method in which to organize your school, to form a bond of organization between members of your school that no authority can ever hope to break. This one dozen minority cannot solve your problems. Neither do we propose to, but how could we ever hope to, if we had the power? If you are too lazy to help assemble others or express your own into a paper, then nothing will ever be accomplished.

We, no not we. Our paper, no not our paper. You, your paper, need to criticize what's wrong with the Cob, if you don't like it. You are the only one who can change it.

This paper needs people to participate, in production. It needs you to come to the meetings which are held at COPE Academy on Sunday at 3:00 at Brookside and Windsor. Finally, your written expression is needed for the survival of this paper.

CORN COB CURTAIN, PAGE 26—EXHIBIT C OF COMPLAINT:



CORN COB CURTAIN, PAGE 32—EXHIBIT D OF COMPLAINT:

DEFINITION OF ASS

For the benefit of the administrators we shall publish a definition of ASS. It is the portion of the anatomy which most people sit on. We have found, however, that at least one Vice-Principal uses his to think with and speak out of in lieu of a head.

• • •

BREAKING MINDS!

Minds start out fresh at birth free and easy. Soon through learning, feeling, and seeing, the infant begins speech. In a few years, he's put in a school-not education, but schooling. After 8th grade, he is able to read, write, and do enough math to get by on. But he is sent further forced to learn.

The idea of education in high school is a lot of shit, a person can learn more about everything by living, travel-

ing, and experiencing. Schooling breaks, bends, twists, and tears the mind down until the person is so confused, he believes in all the shit that is put in him.

The U?S? talks about brainwashing Russia and China. What about brainwashing in good ole apple pie America?

Starting in grade school, the child is taught to be a good American citizen and salute the flag and that Communism and Socialism are bad. But, that child is never told what Communism and Socialism are in a real sense—only that they're bad and their bad points. . The child, as child, boy, man, or woman, is *never* taught the fucked up points about its own government and society.

This mind is broken in all of us and it's still hard for me to get off some of my prejudice ways, but I try, and that's a lot more than I can say for the U?S? schools.

I have a suggestion: read "*Custer Died Your Sins,* an Indian manifesto by Vine DeLoria, Jr., and see how great this country of our is.

Maybe, just by chance, that book might (if not only slightly crack) can break your mind, and make you think and when you do BE ASHAMED of your great, great grandfathers and all Americans.

FANGMEIER

CORN COB CURTAIN, PAGE 38—EXHIBIT E OF COMPLAINT:

Last issue one of my fellow Franklin Central students had a letter published. His letter represents over half of our school, which should say something for Franklin Central.

Most of the students at our school listen to "our leader" P.C., who is one of Hitler's few living henchmen. He tells you what to wear, when to wear it, and how your hair should be cut. He, like his followers, lives in the mid-1940's.

The students of this school are so plastic that it's unreal. When one of the "group" say something is wrong half the school jumps. Apparently one of our higher class groups decided that the Curtain was derrimental to the school and their leader.

I must apologize for the writer of that letter, mainly because he doesn't have any sense.

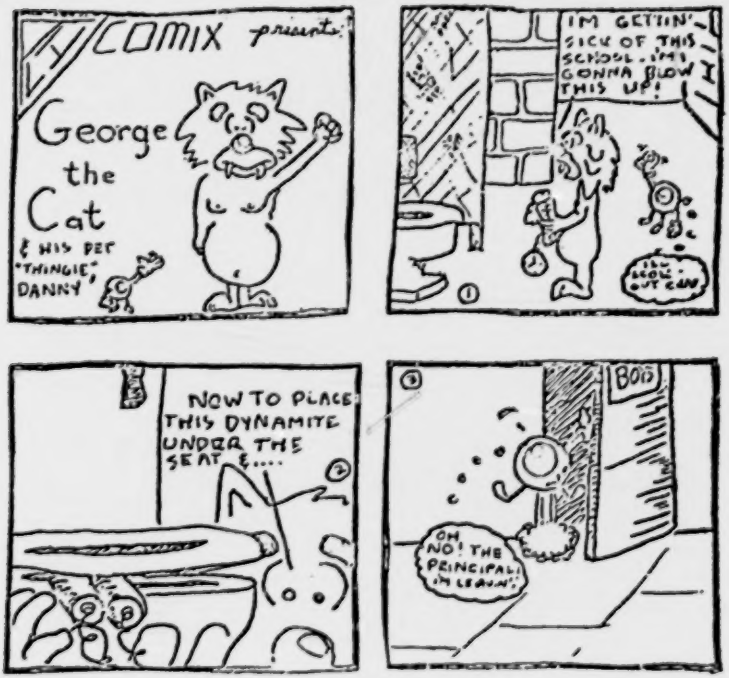
This school will gradually change, but until then the Curtain is our only source of enjoyment from the outside world. Sort of like Radio Free Europe.

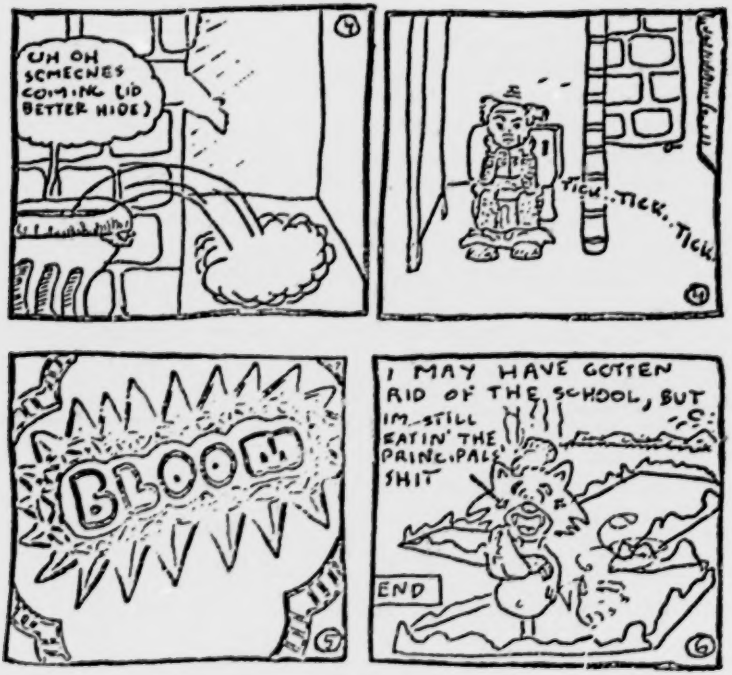
Keep the paper coming our way; there are a few of us who have control of minds.

CHRIS GOLDER

To the group: Fuck off!

CORN COB CURTAIN, PAGE 48—EXHIBIT E OF COMPLAINT:





DEFENDANTS' EXHIBIT C

AFFIRMATION

I/we, being parents of students and/or students of high schools and/or administrators in high schools in the City of Indianapolis, hereby affirm under penalty of perjury that the following facts are true:

1. I have reviewed the attached exhibits A and B. [Exhibit A-Definition of hippie, reprinted at App. 57-58; Exhibit B-Bomb cartoon, reprinted at App. 62-63]
2. Said exhibits are offensive to me and my sense of morals, decency, and have no place in our school system.
3. Said documents attached as said exhibits are embarrassing and if distributed at the schools would be disruptive and unsettling to a great majority of the students and teachers and staff, in my opinion.

4. I believe that some of the material which dominates the entire publication in impact if not in quantity predominantly appeals to the prurient, shameful, or morbid interests of minors; is patently offensive to prevailing standards in the educational community as a whole with respect to what is suitable material for minors; and is utterly without redeeming social importance for minors.
5. I feel that there is absolutely no valuable social purpose served by the dissemination of any said exhibits; that the matter contained therein is contrary to the moral code of the great majority of people in this community, including the great majority of minor children attending high schools in the community.
6. I feel that some of the matter attached as exhibits hereto is defamatory in that it paints the principal as a person who is so worthless and deplorable that he should be destroyed and blown up, and it conveys the message to students that he is so bad and foul that even after being destroyed by dynamite his presence is still felt in a vile way.
7. I also feel that unfair attacks upon the administration and members of the faculty and staff without designating authors of such articles is deplorable.
8. I believe that cartoons which purport to recommend that the school should be blown up along with the principal might actually promote such a tragic incident.

PLEASE SIGN BELOW

(Signatures of 220 parents and students omitted in printing)

(Signatures of 10 high school principals and two vice principals omitted in printing)

RT. U. S.

MAR 5 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ———

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and injunction of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause No. 72-2030, on December 14, 1973.

OPINIONS BELOW

The December 14, 1973 opinion of the Court of Appeals as yet unreported is reprinted as Appendix C. The October 19, 1972 opinion of the United States District Court for the Southern District of Indiana, reported at 349 F. Supp. 605, is reprinted as Appendix B. The Findings of

Fact and Conclusions of Law of the District Court is printed as Appendix A.

JURISDICTION

The Board of School Commissioners of the City of Indianapolis, Indiana, Erle A. Kightlinger, Mrs. Cary Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, Kenneth Martz (now succeeded by W. Fred Ratcliff), members of the Board of School Commissioners of the City of Indianapolis and Karl R. Kalp, as Superintendent of Schools, and Wayne Kincaid, as Administrative Assistant are petitioners herein. Susan Chandler and Sally Swan for themselves and all others similarly situated are the respondents herein.

The judgment of the Court of Appeals was entered on December 14, 1973. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. In a court's consideration of the extent of constitutional (First and Fourteenth Amendments) restrictions upon the power of a school board to adopt rules governing student conduct in elementary and secondary schools:

a. Do the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes also apply to rules adopted by a school board which subject students to disciplinary measures for certain activities in school?

b. May conduct or language of minor students, not regulated in the community at-large, be constitutionally regulated within elementary and secondary schools?

c. Is it constitutionally permissible for school authorities to impose greater restrictions on minors than the

state could constitutionally impose on adults without violating the First Amendment?

2. Does the United States Constitution (First and Fourteenth Amendments) prohibit a school board from adopting rules concerning the distribution of literature by students in its elementary and secondary schools which subject students to disciplinary measures for the following activities?

a. Solicitation of funds or sales of literature and/or other products to students within elementary and secondary schools;

b. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

c. Student distribution of anonymous literature or literature which is not written by a student or school employee; and

d. Distribution of literature by students in schools while classes are being conducted in the school in which the distribution is to be made.

3. Are words found throughout a student newspaper, such as "f---, eat shit" awarding points for the number of "freak girls screwed," and a cartoon picturing the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," obscene as to minors and can school authorities punish students for the use of such language in elementary and secondary schools, even if such language is held to be filthy, vulgar and indecent, but not legally obscene as to minors?

4. Does the United States Constitution prevent a school board from adopting reasonable rules which would require

prior approval by school authorities of literature before its distribution in elementary and secondary schools?

5. Did the Court err in holding that Rule 17(c) of the Federal Rules of Civil Procedure requiring the appointment of an appropriate representative for infants in litigation did not apply where a constitutional question was presented?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States and Rule 17(c) of the Federal Rules of Civil Procedure which have been reprinted in Appendix D herein. The Rules promulgated by the Board which were held unconstitutional by the Court of Appeals are reprinted as Appendices E and F.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C., Section 1983, and 28 U.S.C., Sections 1343, 2201 and 2202.

On June 1, 1972, plaintiffs, high school students in the Indianapolis Public Schools, filed a class action for declaratory and injunctive relief, and for compensatory and punitive damages in the United States District Court for the Southern District of Indiana, the Honorable William E. Steckler, presiding trial judge. The defendants in said cause were the Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter referred to as the Board) and the Superintendent and Administrative Assistant of the Indianapolis Public Schools. Plaintiff students sought an injunction against said defendants, enjoining them from prohibiting distribution of the *Corn Cob Curtain*, an unofficial student news-

paper, in the Indianapolis Public Schools. The students also sought a declaratory judgment that Board Rules 11.05 and 11.06 violated their constitutional rights (First and Fourteenth Amendments). These rules, which required the Superintendent's prior approval before sales or solicitations or the distribution of literature would be permitted in the schools, were declared unconstitutional by the District Court after an evidentiary hearing on August 24-25, 1972. The Court on August 24, 1972, also denied defendants' petition for appointment of guardian ad litem or next friend for plaintiffs and all members of the class they purport to represent.

In September, 1972, pursuant to the Court's order, the Board adopted Resolution 1033, amending Rule 11.05 and amended Resolution 1034, amending Rule 11.06. Resolution 1033 is printed as Appendix F. Although amended Rule 11.05 still required prior review of student literature, procedural safeguards and guidelines were added as were suggested by the Second Circuit in *Eisner v. Stamford Board of Education* (2d Cir. 1971), 440 F.2d 803. However, due to the Court's belief that any requirement of prior approval of student literature was unconstitutional and its order of September 29, 1972, directing the Board to submit additional and/or supplemental guidelines regarding the sale and distribution of student publications, the Board again amended Rule 11.05 to remove the requirement of prior review of student literature. The complete text of this final amendment is found in the District Court's Opinion in Appendix B.

On October 19, 1972, the Court entered a permanent injunction against the defendants, setting out certain conditions for Board rules and declared amended Rule 11.06 and five sections of amended Rule 11.05 unconstitutional. The amended sections or rules held unconstitutional are printed in Appendix E. On November 9, 1972, defendants filed a notice of appeal to the United States Court of Ap-

peals for the Seventh Circuit from the judgment and order of October 19, 1972. The Board requested that the Court of Appeals hold that the first amendment of Rule 11.05 (prior approval with safeguards) and the second amendment of Rule 11.05 and Rule 11.06 were constitutionally permissible and that the Court find the foul language in the *Corn Cob Curtain* obscene as to minors or that minor students could be disciplined for the use of such language in school even if it was not legally obscene as to minors.

In addition, the Court of Appeals was requested to reverse the District Court's decision due to its failure to follow Rule 17(c) of the Federal Rules of Civil Procedure, and to vacate part of the injunction for overbreadth and declare it invalid to the extent that it prohibits review of student literature prior to its distribution in school. Although the Court of Appeals failed to mention these last two issues, it affirmed the District Court's judgment and injunction in all respects, Judge Christensen dissenting in part.

After the distribution of a few issues of the *Corn Cob Curtain* (hereafter referred to as *CCC*), the students were informed that they could not sell the *CCC* in school because of its obscene, defamatory, abusive, filthy and indecent content, and its disruptive effect on the learning process. School officials objected to the use of language such as "eat shit," and "f - - -," an obscene cartoon depicting the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," and false charges of racial discrimination against a coach.

The testimony of the Superintendent and affidavits from all principals in Indianapolis high schools and over 100 parents in the school community were offered and admitted to prove that the *CCC* appealed to the prurient, shameful

or morbid interest of minors, was patently offensive to prevailing standards in the community with respect to what is suitable material for minors and utterly without redeeming social importance for minors. There were no counter affidavits. In fact, plaintiffs testified that the use of such four-letter words was improper, upsetting, and embarrassing and that anonymous articles were sent to a post office box and were printed in the *CCC* as is, with absolutely no editing. Furthermore, it was the policy of the *CCC* never to edit material received, even from unknown sources and to protect the names of its authors.

REASONS FOR GRANTING THE WRIT
QUESTION ONE

Six Board rules governing student conduct and distribution of literature in the Indianapolis Public Schools were held facially unconstitutional for vagueness and/or overbreadth. No other court in the history of this country has held similar Board rules unconstitutional. The Court based its decision on three erroneous principles of law. First, the Court assumed that the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes must also apply to rules adopted by a school board which subject students to disciplinary measures for certain activities in schools. Second, the Court assumed that if the conduct or language of minor students was not regulated in the community at-large or could not result in criminal prosecution, it could not constitutionally be regulated within elementary and secondary schools. Third, it assumed that the power of school authorities to control the exercise of press related activities of minors does not reach beyond the scope of state authority over adults. These premises or principles of law on which the Court based its opinion have been rejected in similar cases by other courts of appeal and also conflict with principles announced by this Court.

a. CRIMINAL STATUTES vs. SCHOOL BOARD REGULATIONS

The question whether the same constitutional standards and tests for vagueness and overbreadth applicable to criminal statutes enacted by a legislature must also apply to rules for student conduct adopted by a school board has never been, but should be decided by this Court. The Court of Appeals in declaring six Board rules facially unconstitutional for vagueness and/or overbreadth assumed that the Board and legislature should be held to the identical strict standards. This assumption flies in the face of numerous decisions to the contrary.

In *Jones v. State Board of Education,* (D.C. Tenn., 1968), 279 F. Supp. 190, *aff'd* (6th Cir.) 407 F.2d 834, *cert. gr.* 396 U.S. 817, *cert. dism'd.* 397 U. S. 31, *reh. den.* 397 U.S. 1018, the Court rejected the contentions of university students that regulations under which they were expelled (for distributing literature advocating a student boycott) were unconstitutionally vague. These regulations prohibited "(1) Disrespect for university authority, (2) Any act in violation of city, county, state or federal law; and (3) Any other infractions of standards of conduct that require severe disciplinary actions." (279 F.Supp. at 201) The Court noted that the students were not attacking a state *statute,* but a student *regulation* found in a university handbook and said "University regulations for students because of the very nature of the institution and its goals and purposes, should not be tested by the same requirements of specificity as are state statutes." (279 F.Supp. at 202.)

In *Baker v. Downey City Board of Education* (D.C. Cal., 1969), 307 F.Supp. 517, the Court held that the state education regulation under which two students were suspended for using profanity and vulgarity in a high school newspaper, which regulation permitted a student's suspension

or expulsion from school for "continued willful disobedience, habitual profanity or vulgarity," was not void for vagueness. The court stated that the requirements for reasonable certainty in schools laws and regulations does not preclude the use of ordinary terms, such as profanity and vulgarity, which find adequate interpretation in common usage and understanding. Yet the Court in the case at bar questioned such words as "significant" and "disruption."

The Third Circuit in *Sill v. Pennsylvania State University,* (3rd Cir., 1972), 462 F.2d 463, stated that since student discipline is not analogous to criminal prosecution, the codes of conduct prescribed for students by educational institutions are not required to satisfy the same rigorous standards for vagueness and overbreadth as are criminal statutes. The court in *Esteban v. Central Missouri State College,* (W.D. Mo., 1968) 290 F.Supp. 622, aff'd 415 F.2d 1077 (8th Cir., 1969), *cert. denied,* 398 U.S. 965, held that the legal doctrine that a prohibitory *statute* is void if it is overly broad or unconstitutionally vague does not, in the absence of exceptional circumstances, even apply to rules of student conduct. The court stated:

> "Judicial notice is taken that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education. . . . By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes, and functions of the institution." (290 F.Supp. at 630.)

To illustrate the Court of Appeal's error, Section 1.1.1.3 of Rule 11.05 (hereafter referred to as Rule A) will be briefly discussed. This rule, held facially unconstitutional for both vagueness and overbreadth, provides:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis Public Schools, or injury to others."

The District Court suggested that the following wording of this rule would be more apt to be constitutionally acceptable:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a substantial and material interference with or delay of normal classroom activity or normal school function."

Defendants respectfully submit that it is not the proper function of a court to declare a rule so vague as to deny due process simply because it preferred other terminology which has the same meaning.

The Court's decision is also in direct conflict with the Second Circuit since it held that a rule virtually identical to Rule A was neither overbroad or too vague. *Eisner v. Stamford Board of Education*, (2d Cir., 1971), 440 F.2d 803. All literature to be distributed in school was to be submitted for prior approval by the school administrator, who, in granting or denying approval, would apply the following rule:

> "No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others." (440 F.2d at 805)

The Second Circuit said to the extent this rule "merely vests school officials with authority which under *Tinker* they may constitutionally exercise, it is on its face unexcep-

tionable." (440 F.2d 808.) The Seventh Circuit was unimpressed by the similarity of Rule A to the *Tinker* standard (App. p. 20) *Tinker v. Des Moines Independent School Dist.*, (1969), 393 U.S. 503. Yet to hold Rule A (which departs in no significant respect from the similar instruction of *Tinker*) void for vagueness and overbreadth contradicts this Court's announcement in *Tinker* that school officials may curtail student actions, even speech, which materially interferes with school activities or discipline. Although the *Eisner* rule did not specify that the foreseeable disruption be either material or substantial as this Court required in *Tinker*, the Second Circuit assumed that the Board would not contemplate suppression of matter that would create only an immaterial disturbance. In contrast, the Seventh Circuit objected to the use of "significant disruption" in Rule A (App. p. 20) Yet many courts would require the *Eisner* rule to be even more precise than Rule A because the *Eisner* guideline was to be used as a basis for prior restraints, while Rule A permits only *subsequent* restraints.

Furthermore, implicit in the Court's finding that Rule A is overbroad is the premise that students should be able to cause *some type* of significant disruption in the school for which they could not be disciplined. This is revealed by the Court's statement that "Expression may lead to disorder under many circumstances where the expression is not thereby deprived of First Amendment protection." (App. p. 21) Since there is no normal educational purpose, function or process which students should be permitted to significantly disrupt, this rule is not unconstitutional for overbreadth.

COURT'S INJUNCTION IS FATALLY OVERBROAD

A crucial part of the issue of overbreadth raised in, but ignored by, the Court of Appeals is that part of the District Court's Order, which permanently enjoins the Board from

the promulgation or enforcement of any rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material, ..." (App. p. 14) The Court of Appeals, in affirming the District Court's decision, upheld this broad injunction although it completely undermines the legal authority and duty of the Board to formulate rules governing the distribution of student literature in its schools. Under Indiana law (P.L. 162, Ind. Stat. Ann., Sec. 28-5358 et seq.), students may not be suspended or expelled unless they have violated a *written* rule approved by the Board. Yet any such rule which would be held permissible under the guidelines of this Court in *Tinker* would constitute a violation of this broad injunction. Thus, this injunction should be vacated for overbreadth since the principles announced by this Court in *Tinker* would clearly allow school authorities to discipline students who distribute materials which cause riots or reactions which substantially disrupt or interfere with school discipline or activities.

Since the Court's injunction prohibits the Board from disciplining students for written material which is not constitutionally protected, i.e., language which causes disruptive "reactions," it also conflicts with the unassailable power of the state to suppress "fighting words . . . which by their very utterance inflict injury and tend to incite an immediate breach of the peace," recognized by this Court in *Chaplinsky v. New Hampshire*, (1942), 315 U.S. 568, or words which "have all the effect of force," *Near v. Minnesota ex rel. Olson* (1931), 283 U.S. 697 at 716.

b. SCHOOL v. COMMUNITY AT-LARGE

In an elementary or secondary school, many children of widely differing backgrounds are brought together for eight hours a day in one building for the purpose of developing their basic intellectual and vocational capacities,

which effort is distasteful to many and resisted by some. There must necessarily be an adjustment of the constitutional principles applicable to the community at-large if the school is to function and accomplish its purpose. Although students do not shed their First Amendment rights at the schoolhouse gate, this Court implicitly recognized in *Tinker* that speech which might be acceptable in the community at-large could constitutionally be prohibited in the schoolhouse under certain circumstances. The rules in the case at bar simply specify certain conduct and circumstances which school authorities must control in order to function effectively without undue disruption.

Although this Court in *Tinker* examined the First Amendment rights of students in light of the special characteristics of the school environment, the Court of Appeals ignored these special circumstances which justify the Board rules. This is revealed throughout the opinion, not only in the Court's application of principles from criminal and other cases pertaining to circumstances and social structures entirely different from that found in the schoolhouse, but by the Court's belief that the Constitution requires school officials to tolerate certain actions or literature which would cause disorder or disruption in the school. (App. p. 21) It failed to recognize that certain acts or speech which might be constitutionally protected in the community at-large would not be so protected in the schoolhouse due to its unique circumstances and functions.

The premise of the Court of Appeals that the regulation of students' speech related activities in the school cannot be more restrictive than in the community at-large has been explicitly rejected by other courts of appeal in their examination of the authority of the school board to regulate student literature in its schools. For example, *Shanley v. Northeast Independent School District*, (5th Cir., 1972), 462 F.2d 960, which upheld the right of school authorities

to require prior approval of material destined for distribution to students, found that the nature of the place in which the restraint operates to be of critical significance. It said:

> "The educational process is thwarted by the milling, mooing and haranguing along with the aggressiveness that often accompanies a constitutionally-protected exchange of ideas on the street corner. There is, of course, a substantive difference between schools and the street corner in terms of weighing the sometimes competing interest of a completely free flow of any and all expression with the requirement that there be order and discipline . . . Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high school, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms." (462 F.2d at 968-9.)

c. MINORS v. ADULTS

The third principle on which the Court based its decision, that the power of school authorities to control the conduct and speech of minors does not reach beyond the scope of state authority over adults, has been rejected by this Court as well as other courts in their consideration of the scope of First Amendment protection. This Court recently observed in *Ginsberg v. New York*, (1968), 390 U.S. 629, 638:

> ". . . We have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches be-

yond the scope of its authority over adults . . .' *Prince v. Massachusetts*, 321 U.S. 158, 170."

Most courts have concurred in the view that, while freedom of the press may not be denied to students, a more stringent regulation of the student press than of the press generally is warranted because of the immaturity of students, especially with respect to high school students. For example in *Schwartz v. Schuker* (D.C. N.Y., 1969), 298 F.Supp. 238, the court, upholding an expulsion of a student for attempting to distribute an underground high school newspaper which, among other things, called the principal a liar and racist, observed that "the activities of high school students do not always fall within the same category as the conduct of college students, the former being in a much more adolescent and immature stage of life and less able to screen fact from propaganda." (298 F.Supp. at 242)

The Fourth Circuit shared this view when it stated in *Quarterman v. Byrd*, (4th Cir., 1971), 453 F.2d 54, that publications may be protected when directed to adults, but not when made available to minors, since First Amendment rights of children are not co-extensive with those of adults. Similarly, the court continued, "a difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university," it being "generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations reasonably defined to adjust these rights to the needs of the school environment." (453 F.2d at 58)

Courts recognize that the "conduct which would affect discipline in secondary schools might go unnoted and be of little or no influence with older students" *Whitsell v. Pampa Independent School District*, (N.D. Tex., 1970), 316 F. Supp. 852, *aff'd* (5th Cir., 1971) 439 F.2d 1198.

The Court of Appeals erred when it failed to consider the significance of age in its determination that the Board rules were not reasonable or necessary to preserve a semblance of discipline, order and decorum in the educational system and that the filthy, obscene language used in the Corn Cob Curtain was not obscene as to minors.

QUESTION TWO

The decision below also conflicts with the well-established principle that a school board rule which regulates student conduct in the schoolhouse should be upheld if there is a reasonable connection of the rule with the proper operation of the schools. *Shanley v. Northeast Independent School District*, (5th Cir., 1972), 462 F.2d 960; *Katz v. McAulay*, (2nd Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933; *Blackwell v. Issaquena County Board of Education*, (5th Cir., 1966), 363 F.2d 749.

a. *Rule 11.06 and Section 1.3.1.5 of Rule 11.05*

(Sales and Solicitations)

When the Court held facially unconstitutional Rule 11.06 and Section 1.3.1.5 of Rule 11.05, which regulate solicitation of funds and sales of literature and other items in the Indianapolis Public Schools, it required the Board to permit its schools to be used for the sale of items for the personal profit of students and/or non-students. This offends the basic principle that "the state, no less than a private owner of property, has the power to preserve property under its control for the use to which it is lawfully dedicated." *Adderly v. Florida*, (1966), 385 U.S. 39. A school board is clearly under no constitutional duty to allow its schools to be used for non-school purposes—particularly commercial activities.

This decision also conflicts with the Second Circuit in *Katz v. McAulay, supra,* which upheld a rule prohibiting

the solicitation of funds from pupils in public schools (without prior written approval by the Board). Although there are many compelling reasons for such a rule, some of which are discussed in *Cloak v. Cody* (N.D.N.C., 1971), 321 F. Supp. 391, which upheld a similar rule, the Second Circuit emphasized the pressures upon students of multiple solicitations and the fact that solicitations compete for the time, attention and interest of the pupils with those who are seeking to administer the school system.

c. *Sections 1.1.1.4 and 1.3.1.6 (Anonymous literature written by non-students)*

Section 1.1.1.4 (hereafter Rule B) which subjects students to disciplinary measures if they distribute in school materials (other than advertisements in the literature) not written by a student or school employee, and Section 1.3.1.6 (hereafter Rule C) which requires the names of persons or organizations participating in the publication of literature in the schools to be plainly written in the literature were held to violate students' First Amendment rights.

The power or right of a school board to regulate the distribution by students in elementary and secondary schools of anonymous literature or materials written by non-students or outside organizations is an issue which has not been, but should be decided by this Court. No other court has held similar rules unconstitutional. Rule B is both reasonable and necessary to prevent the distractions, disorder and interference with school activities which would result if students were permitted to sell or distribute materials written by non-students and outside organizations to a large captive audience of immature minds. Since non-students or outside organizations have no legal or constitutional right to sell or distribute anything in the schools, they cannot subvert this basic principle by having students distribute their material. Since this rule places no restric-

tions on what *students* can quote or write, it is not an infringement of their First Amendment rights.

The requirement in Rule C that names of participating students appear in the publication has a reasonable basis. Such a rule is the only reasonable means to identify those responsible for misrepresentation, serious disruption, fraud, libel and obscenity since the *Corn Cob Curtain* edits nothing and protects the names of its authors.

This Court has upheld federal statutes which prohibit anonymous publications in certain situations. For example, a statute requiring any newspaper using the second class mails to publish the name of its editor, publisher, owner and stockholders was upheld in *First Louis Publishing Co. v. Morgan*, (1913), 229 U.S. 288. A direct analogy can be made to the instant case. The Board's control over the use of its schools may be compared to the government's control over the use of its mails. The Federal Regulation of Lobbying Act in which Congress requires those engaged in lobbying to divulge their identities and certain other information was held valid in *U.S. v. Harriss*. (1954), 347 U.S. 612. This Court noted that although some person might choose to remain silent because of fear of possible prosecution for failure to comply with the Act, "the restraint is at most an indirect one resulting from self-censorship . . . ," (347 U.S. at 626.) The Board submits that any similar deterrent effect Rule C might have upon a student's First Amendment rights is too indirect, speculative and insubstantial to justify holding it unconstitutional.

The Seventh Circuit's reliance upon *Talley v. California*, (1960), 362 U.S. 60, in declaring Rule C unconstitutional, was misplaced since *Talley* was specifically restricted to the broad penal ordinance at issue. This ordinance barred distribution of "any handbill in any place under any circumstances" unless it contained the names and addresses of the person(s) who printed, wrote, compiled, manufac-

tured or distributed it. To equate the Board rule with this ordinance is to ignore the reasons for the rule and the unique circumstances, environment and functions of the school. The rule, unlike the ordinance in Talley, is not a criminal statute and applies only to children, students on school property.

d. *Section 1.3.1.1 (Distribution during class hours)*

Section 1.3.1.1 prohibits the student distribution of literature in school while classes are being conducted in the school. Neither *Grayned v. City of Rockford,* (1972), 408 U.S. 104, nor *Tinker, supra,* cited by the Court as support, require or justify the Court of Appeals decision that this rule was facially unconstitutional for overbreadth. In fact, said decision conflicts with the principles announced in these cases. Contrary to the belief of the Seventh Circuit, a primary or secondary school is not a public place in the same sense as street and parks. In fact, both *Grayned* and *Tinker* recognized the "special characteristics of the school environment" and that a speech connected activity which might be perfectly appropriate in a park may unduly interfere with the good order and functioning of a school. This Court in *Grayned* stated that the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time because "the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." (408 U.S. at 116.)

The Seventh Circuit concedes that it is constitutionally permissible to prohibit distribution in the classroom itself or elsewhere in the school if all the students are required to be in a class. However, the Court erroneously assumed that there are periods when substantial numbers of students are in school, but are not involved in classroom activity at the time classes are in session for other students. The only

time that some students would be at school and yet not in class while classes are in session would be during a split lunch or split assembly period. To prohibit distribution of literature in the cafeteria or in a school assembly is not an impermissible infringement upon students' First Amendment rights, since it is not unconstitutional to limit their uses as places to eat or watch programs. To allow distribution of literature in the cafeteria or auditorium during assemblies would unreasonably interfere with the proper order and functioning of both.

QUESTION THREE

This Court has never decided, but should settle, the crucial issue of the extent of the power of school officials to either prevent or punish the use in elementary and secondary schools by minors of such language as "f---, screw, and eat shit." The Court held that this foul language and the filthy cartoons found throughout the *CCC* were not obscene as to minors and thus not subject to any control by school authorities. In so holding, the Court misconstrued and erroneously extended and misapplied several decisions of this Court.[1] Crucial facts and circumstances in these three cases can be readily distinguished from those of the case at bar. The instant case concerns *minors* in the unique setting of the elementary or secondary schoolhouse. No criminal conviction is involved as in *Cohen* and *Miller*, and there has been no attempt to regulate speech or press outside of the school.

The Board submits that the *CCC* is obscene as to minors under *Ginsberg v. New York*, (1968), 390 U.S. 629 in which this Court recognized that the standard for legal obscenity for children differs from the standard for adults. All the

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[1] *Papish v. Board of Curators of University of Missouri*, (1973), 410 U.S. 667; *Cohen v. California*, (1971), 403 U.S. 15; *Miller v. California*, (1973), — U.S. —, 41 L. W. 4925.

evidence revealed that the *CCC* is obscene as to minors. There was no evidence to the contrary. Furthermore, such important interests of the Board as maintaining an atmosphere conducive to an orderly program of classroom study and learning require the prohibition of the use of such filthy language by minors in school even if it is not legally obscene as to minors. The quality of education in this country depends upon this Court's decision.

QUESTION FOUR

This Court should also resolve the conflict between the Seventh Circuit and other courts of appeal as to whether a school board may constitutionally adopt a reasonable rule requiring the prior approval by school authorities of literature before its distribution by students in elementary and secondary schools.

In contrast to the Seventh Circuit, which is clearly of the opinion that a school board could never justify any prior restraint upon student literature in schools, *Fujishima v. Board of Education,* (7th Cir., 1972), 460 F.2d 1355, other courts of appeal have generally upheld the right of school boards to require review of literature prior to its distribution in schools, subject to procedural safeguards insuring a prompt, non-arbitrary decision. For example, the Second Circuit in *Eisner v. Stamford Board of Education,* (2nd Cir., 1971), 440 F.2d 803 said that if the bases for previously restraining student literature are clearly set forth in the school regulations and are valid, that is to say, such as would justify subsequent restraint or punishment, then in view of the special nature and purpose of schools and the immaturity of its inhabitants, it is reasonable to permit prior restraints. In *Shanley v. Northeast Independent School District,* (5th Cir., 1972), 462 F.2d 960, the Fifth Circuit concluded that it is constitutionally permissible to require that material destined for distribution to students

be submitted to the school administration for approval prior to distribution.

The belief of the Seventh Circuit that any prior restraint upon student literature is unconstitutional also conflicts with decisions of this Court. For example, this Court in *Chaplinsky v. New Hampshire, supra,* said:

> "There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have *never* been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Emphasis added, 315 U.S. at 571.)

More recently, this view was reaffirmed when this Court observed in *Bantam Books, Inc. v. Sullivan,* (1963), 372 U.S. 58, 70 n. 10, that prior restraints are not "necessarily unconstitutional under all circumstances."

Petitioners respectfully request that this Court define the permissible limits of prior approval of student materials by the Board and hold constitutional the Board's first amendment of Rule 11.05 (App. F) and declare the Court's injunction invalid to the extent that it prohibits the Board from requiring prior approval of literature in schools.

QUESTION FIVE

The District Court held that where constitutional questions as distinguished from money damages are involved, the requirements of F.R. Civ. P. 17(c) (Appendix D) do not apply. This rule required the Court to either appoint a guardian ad litem for minor plaintiffs and the infants they purported to represent or make such other order as was proper for their protection.

The Court's refusal to apply F.R. Civ. P. 17(c) conflicts with the Fifth Circuit's decision in *May Roberts, et al. v.*

Ohio Casualty Insurance Company (5th Cir., 1958), 256 F.2d 35 which said:

> "We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the Court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the Court has considered the matter and made a judicial determination that the infant is protected without a guardian. In *Till v. Hartford Accident & Indemnity Co.,* (10th Cir., 1941), 124 F.2d 405, the Court found that a guardian ad litem was not necessary only because the infant was represented through a next friend, the alter ego of a guardian ad litem. In *Zaro v. Strauss,* (5th Cir., 1948), 167 F.2d 218, this Court held that an attorney's representation of an incompetent was insufficient to satisfy the requirements of Rule 17(c).
>
> "The record in this case shows that no one gave a thought to the appointment of a guardian ad litem until after judgment was rendered below. Apparently it was an oversight. We believe that the discretion lodged in the trial judge in Rule 17(c) was not intended to apply to such a situation. The orderly administration of justice and the procedural protection of minors requires the trial judge to give due consideration to the propriety of an infant's representation by a guardian ad litem before he may dispense with the necessity of appointing the guardian.
>
> "The judgment is reversed and remanded for further proceedings not inconsistent with this opinion."

The Seventh Circuit's decision not only reveals the Court's refusal to differentiate betwen minors and adults even when the Federal Rules so require, but is significant because of the distinct possibility that infant plaintiffs could have reversed the decision had they lost.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,
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Appendices

APPENDIX A

JEFF JACOBS, ET AL.,
Plaintiffs,
v.
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,
Defendants.

United States District Court, S. D. Indiana, Indianapolis Division
No. IP 72-C-263
Oct. 19, 1972.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STECKLER, Chief Judge.

Heretofore, on June 1, 1972, Jeff Jacobs, Susan Chandler, Martin Laubach, Nancy Rood, Sally Swan and George Yarbrough, for themselves and all others similarly situated, filed their complaint and motion for temporary restraining order against the original defendants for relief with respect to the rule, regulation and policy of the defendants which prohibited the sale and distribution of student publications unless previously authorized by the General Superintendent. Since the filing of plaintiffs' complaint, Jeff Jacobs, Martin Laubach, Nancy Rood and George Yarbrough have graduated from the secondary schools in the Indianapolis Public School System. The Court takes judicial notice of the fact that certain changes have recently taken place with respect to the composition of the defendant. The Board of School Commissioners of the City of Indianapolis, Indiana, and accordingly, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, and Constance R. Valdez are substituted respectively for Robert DeFrantz, Sammy Dotlich, Jerry P. Belknap, and Landrum E. Shields.

The substance of plaintiffs' complaint is that the defendants have unconstitutionaly prohibited distribution of the Corn Cob Curtain, a student newspaper, by imposing prior restraints thereupon.

The Court assigned August 24, 1972, as the hearing date for plaintiffs' motion for temporary restraining order and preliminary injunction. Thereafter, on August 29, 1972,

this Court ordered that the Board of School Commissioners of the City of Indianapolis shall have three weeks from that date to adopt reasonable guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis. On September 27, 1972, the Board of School Commissioners of the City of Indianapolis filed their revised Resolutions 1033 and 1034 which resolutions amended Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners. Resolution 1033 provided for prior review of student publications; Resolution 1034 prohibited sales of any student publication or of the collection of contributions to support such publications.

The parties, by counsel, having met in conference with the Court on September 27, 1972, and the Court taking the matters under advisement, this Court ordered plaintiffs to submit to the Court reasonable guidelines regarding the sale and distribution of student publications in the public schools of the City of Indianapolis no later than October 6, 1972. This Court also ordered the Board of School Commissioners of the City of Indianapolis to submit to this Court additional and/or supplemental guidelines regarding the distribution and sale of student publications in the public schools of the City of Indianapolis no later than October 13, 1972. Both parties have submitted their guidelines as ordered by the court.

The Court, pursuant to Rule 52, Federal Rules of Civil Procedure, now makes it findings of fact and conclusions of law.

FACTS

1. That plaintiffs are students in the public schools of the City of Indianapolis who publish a student publication entitled the "Corn Cob Curtain."

2. That defendants have adopted, implemented and enforced Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners which prohibit the distribution and sale of all student publications unless authorized by the General Superintendent.

3. That the plaintiffs were prohibited from distributing, selling and seeking voluntary contributions for the Corn

Cob Curtain in the public schools of the City of Indianapolis.

4. That the defendant Board of School Commissioners of the City of Indianapolis subsequently amended their Rules by the adoption of Resolution 1033 and 1034 which respectively require prior review of publications and prior approval before students can distribute publications, and which prohibit the sale, collection of money or solicitation of funds or contributions within any school in the City of Indianapolis.

5. In a final revision of its rules, the Board of School Commissioners further amended Rule 11.05 so as to prohibit distribution in any school of literature not written by a student, teacher or other school employee, and which contain vague prohibitions against advertisements contained in student publications. The guidelines further prohibit distribution while classes are being conducted in the school in which the distribution is to be made. The rule further prohibits sales and contributions to finance such publications or distributions, and requires that the name of every person or organization be plainly written on the literature itself.

6. Rule 11.06, as amended, remained unchanged.

7. Plaintiffs have been prohibited from distributing the Corn Cob Curtain from June 3, 1972, to the present by reason of the aforementioned rules.

8. Plaintiffs have another issue of the Corn Cob Curtain which is ready for current distribution in the public schools of the City of Indianapolis.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject-matter of this cause pursuant to 28 U.S.C. § 1343.

2. This Court, in view of the recent decision rendered in the case of *Fujishima* v. *Board of Education*, must hold that defendants' rules constitute an unconstitutional prior restraint in violation of the First Amendment. Absent a showing of material and substantial interference with the requirements of school discipline, schools may not restrain

the full First Amendment rights of their students. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

3. Defendants have failed to show any material and substantial interference with school discipline in this cause.

4. Plaintiffs have the right as guaranteed by the First Amendment to publish and distribute the Corn Cob Curtain in the public schools of the City of Indianapolis.

5. Defendants may not prohibit the sale and/or collection of voluntary contributions for the Corn Cob Curtain. *Riseman* v. *School Committee*, 439 F.2d 148 (1st Cir. 1971); *Sullivan* v. *Houston Independent School District*, 333 F. Supp. 1149 (S.D. Tex. 1971).

6. Plaintiffs may publish, distribute, sell, and seek voluntary contributions for the Corn Cob Curtain pursuant to the provisions of the First Amendment to the United States Constitution.

APPENDIX B

JEFF JACOBS, ET AL.,
Plaintiffs,
v.
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,
Defendants.

United States District Court, S. D. Indiana, Indianapolis Division
No. IP 72-C-263
Oct. 19, 1972

ENTRY ON MOTION FOR PERMANENT INJUNCTION

STECKLER, Chief Judge.

This action is before the Court on the plaintiffs' motion for, among other things, an order against the defendants enjoining said defendants, their agents, servants, and employees, and all those in active concert and participation with them, from continuing to suppress and prohibit the distribution of the *Corn Cob Curtain*. Jurisdiction is based under Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343, 2201 and 2202.

On August 24-25, 1972, an evidentiary hearing was conducted. Oral argument was heard on the motion for temporary restraining order and the collateral issues raised by Defendants' Petition for Appointment of Guardian Ad Litem or Next Friend for Plaintiffs and All Members of the Class They Purport to Represent, and Petition of Defendants for an Order Requiring Plaintiffs' Attorney to Produce Authority Under Which He Appears. The Court denied defendants' motion to assign guardian ad litem, and granted defendants' motion for plaintiffs' attorney to show authority. Plaintiffs' attorney filed a memorandum in response to defendants' motions; the Court found that the regulations governing the services to be rendered by the Legal Services Organization and the persons whom it is to represent was not a matter for this Court to determine or fix, but rather if the defendants had a complaint, this

was a matter to be taken up with the funding authorities and the organized bar. The Court found that plaintiffs' attorneys could proceed with representation. *See, Hernandez* v. *Stockton Bd. of Education,* 6 Clearinghouse C.R. 172 (July 1972); *State ex rel. Koch* v. *Vanderburgh Probate Court,* 246 Ind. 139, 203 N.E.2d 525 (1965).

The parties by counsel met in conference with the Court on September 27, 1972, and the defendants presented Resolutions 1033 and 1034 having been adopted by the Board of School Commissioners of the City of Indianapolis to amend Rules 11.05 and 11.06 of the Rules of the Board of School Commissioners, *i.e.,* the rules subject to complaint in this litigation. While these resolutions were under advisement for further consideration by the Court, the defendants filed Additional Paragraph of Answer with exhibits on October 12, 1972, with consent of plaintiffs; Exhibit A attached thereto replaced Resolution 1033 filed September 27, 1972, and Exhibit B was identical to Resolution 1034 filed September 27, 1972. [Hereinafter Exhibits A and B filed October 12, 1972, amending School Board Rules 11.05 and 11.06, will be referred to as Rules 11.05 and 11.06.]

Rules 11.05 and 11.06 subject to complaint in this litigation are as follows:

Rule 11.05 [Exhibit A]

1. *General.* The following rules shall govern the distribution of literature and other communicatory material (hereinafter collectively referred to as 'literature') by students in the Indianapolis public school system (any of whom is hereinafter referred to as 'a student') in or upon the School Board's public school buildings, structures and/or grounds (the term 'school' being used, hereinafter, to signify any such building, structure or the grounds of any such building or structure).

1.1. *Distribution of Certain Kinds of Literature Prohibited.*

1.1.1. No student shall distribute in any school any literature that is—

1.1.1.1. obscene as to minors

1.1.1.2. libelous or

1.1.1.3. either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.

1.1.1.4. not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted.

1.1.2. Literature other than literature of the kind described in Section 1.1.1. above, is hereinafter referred to as 'distributable literature.'

1.2. *Who May Distribute Distributable Literature.* Subject to the provisions of Section 1.3. below, distributable literature may be distributed by, and only by, any student, within any school in which the student is regularly enrolled.

1.3. *Conditions Under Which Distributable Literature May Be Distributed.*

1.3.1. No distributable literature shall be distributed by any student in any school—

1.3.1.1. while classes are being conducted in the school in which the distribution is to be made;

1.3.1.2. in any place other than a place designated by the principal of the school in which the distribution is to be made, which place shall be selected by the principal with a view toward insuring that the proposed distribution will be made without interference with other persons lawfully within the school;

1.3.1.3. in such a way that the place of distribution (or any other part of the school in which the distribution is made) becomes littered;

1.3.1.4. in such a way that any person within the school can reasonably be made to feel that the distributable literature is being 'forced' upon him;

1.3.1.5. in immediate exchange for money or any other thing of value (or for an immediate promise of money or

any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature; or

1.3.1.6. unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself.

1.4. *Spirit in Which the Foregoing Regulations are to be Applied.*

In the application of the foregoing regulations pertaining to the distribution of literature in the schools by students, principals and other school administrators shall take care to insure that the constitutional and other legal rights of students to express themselves freely shall not be infringed. The spirit in which the regulations shall be applied shall not be a repressive one, but shall combine a respect for the rights of students with an appropriate regard for the maintenance in the schools of the kind of environment that is necessary to the School Board's conduct of its public educational mission in the School City of Indianapolis.

1.5. *Limitation of the Scope of the Foregoing Rules.*

The foregoing rules define the conditions under which students will be permitted to distribute literature in the schools. Nothing in those rules is intended to be, or is, or shall be construed as, an indication that the School Board will permit, without its express prior consent, the distribution in any school of any literature or other article by any person who is not a student in the school where the literature is to be distributed.

1.6. *Penalties for Violation and Student Rights of Review and Appeal.*

1.6.1. For violation of any of the provisions of this Rule 11.05 a student may be suspended or expelled by the principal of the school where such violation occurs and the prin-

cipal or any teacher of the school may take other disciplinary action which is reasonably desirable or necessary to help any student, to further school purposes, or to prevent any interference therewith.

1.6.2. In the event that suspension or expulsion is deemed necessary, the due process provision of public law 162 of the laws of the State of Indiana and the rules of this board adopted by Resolution #1030 shall apply.

1.7. *Severability of Rule.*

If any one or more sections, clauses or phrases of this Rule 11.05 shall be declared unconstitutional, such decision shall in no sense invalidate any other part of this act.

Rule 11.06 [Exhibit B]

No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, *or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance*, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus.

The Seventh Circuit has held that students may commence actions seeking relief for infringement of their constitutional rights. *Fujishima* v. *Bd. of Education*, 460 F.2d 1355 (7th Cir. 1972); *Scoville* v. *Bd. of Education of Joliet Tp. H. S. Dist. 204, etc.*, Ill., 425 F.2d 10 (7th Cir. 1970); *Crews* v. *Cloncs*, 432 F.2d 1259 (7th Cir. 1970).

In the instant case there can be no discomfort to strict constructionists who prefer their Constitution to be literal. No right is more clearly within the protection of the First Amendment, whose provisions *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), has now extended to the public school, than the freedom to distribute printed matter. Throughout our constitutional history, only three exceptions have been permitted to limit this freedom, and the exceptions themselves have been narrowly construed; these exceptions include obscenity, libel, and speech which con-

stitutes a "clear and present danger." [In the context of the public school, the *Tinker* decision defined "clear and present danger" as that which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. 503 at 513, 89 S.Ct. 733 at 740.]

The interpretation of two of these three limitations, obscenity and to a lesser degree, "clear and present danger," provides the matrix for the controversy confronting this Court.

PRIOR RESTRAINT AND PRIOR CENSORSHIP

In the recent Seventh Circuit case of *Fujishima, supra,* a blanket prior restraint similar to the one relied upon by defendants in the instant case was invalidated. The Court disposed of the matter saying:

> "Because section 6-19 requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment. This conclusion is compelled by combining the holdings of *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697 [51 S.Ct. 625, 75 L.Ed. 1357] (1931), and *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503 [89 S.Ct. 733, 21 L.Ed.2d 731] (1969). *Tinker* held that, absent a showing of material and substantial interference with the requirements of school discipline, schools may not restrain the full First-Amendment rights of their students. *Near* established one of those rights, freedom to distribute a publication without prior censorship." [Footnote omitted.] *Fujishima,* 460 F.2d at 1357.

Fujishima recognized that a school district may lawfully establish a rule punishing students who publish and distribute on school grounds material which is obscene or libelous. *See also, Sullivan* v. *Houston Independent School District,* 333 F.Supp. 1149, 1162-1167 (S.D.Tex. 1971).

OBSCENITY

Perhaps the major thrust of the defendants' attack concerns "obscenity." Obscenity was defined in *Roth* v. *United*

States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311, 1 L.Ed.2d 1498 (1957), in the following terms:

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Mr. Justice Brennan, delivering the opinion of the Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts*, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966), stated:

> "Under this definition [of obscenity], as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Later, Mr. Justice Brennan discussed the power to employ variable concepts of obscenity in *Ginsberg* v. *New York*, 390 U.S. 629, 636, 88 S.Ct. 1274, 1278, 20 L.Ed.2d 195 (1968), and quoted the Court of Appeals of New York in *Bookcase, Inc.* v. *Broderick*, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 952, 218 N.E.2d 668, 671 (1966):

> "[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined."

In determining whether future issues of the *Corn Cob Curtain* may be determined "obscene" pursuant to the three-pronged definition as applied to minors, two important limitations on the obscenity test must be remembered. First, the definition of "contemporary community standards" by which a work must be judged to determine its

obscenity must necessarily be the community standards of the Indianapolis School District, not merely one school in said district. Second, in judging whether a publication of the *Corn Cob Curtain* is "obscene" according to legal standards laid down by the higher courts, the whole publication must be considered. As long ago as 1934 it was held that a publication must be considered as a whole in order to determine whether it is obscene. *United States* v. *One Book Entitled "Ulysses" by James Joyce*, 72 F.2d 705, 707 (2d Cir. 1934). *See, Roth* v. *United States, supra.* A federal court recently rejected the argument that an alleged obscene newspaper need not be judged as a whole, because it is merely a package of separate publications. *United States* v. *Head*, 317 F.Supp. 1138, 1143 (E.D.La.1970).

BAN ON SALES

A further objection to the Board's regulations concerns the ban on sale of distributable literature. As presently constructed, Rule 11.05, Section 1.3.1.5, would prevent many worthwhile fund raising projects on school grounds, for example, magazine sales by school band members or the often financially necessary sale of the "local school newspaper." Likewise, Rule 11.06 would prohibit fund raising for charities and other public service groups organized outside the school. Further, defendants would prohibit all sales of distributable literature, irrespective of "disruption." "Such a blanket proscription is not a legitimate exercise of the Board's power to regulate the 'time, place and manner' of distribution." *Sullivan* v. *Houston Independent School District, supra,* 333 F.Supp. at 1162.

Accordingly the Court concludes, and it is hereby ordered, that the named plaintiffs who are no longer students in a secondary school of the City of Indianapolis have no standing to sue in this cause. *See, consolidated appeals, Passwater* v. *Myers, Steel* v. *Kuykendall, Monroe* v. *Eads,* Nos. 71-1367, 71-1570, 71-1571 (7th Cir., September 15, 1972); *Watkins* v. *Chicago Housing Authority,* 406 F.2d 1234 (7th Cir. 1969). However, the remaining named plaintiffs are qualified as proper representatives of the class whose interest they seek to protect. *Fujishima* v. *Bd. of Education, supra.*

It is further ordered that the defendants, their successors in office, their agents, servants, and employees, and all those in active concert and participation with them are hereby permanently restrained and enjoined from the promulgation, maintenance and enforcement of any such rule, or portion thereof, found in this entry to be unconstitutional unless the following conditions are met:

(1) The rule must be specific as to places and times where possession and distribution of published materials are prohibited.

(2) The rule must be understandable to persons of the age and experience of covered students.

(3) The rule must not prohibit or inhibit conduct which is orderly, peaceful and reasonably quiet and which is not coercive of any other person's right to accept or reject any written material being distributed subject to the rule.

(4) The rule may prohibit such distribution at times and in places where normal classroom activity is being conducted. Such rule may not prohibit such distribution at other times and places unless such prohibition is necessary to prevent substantial and material interference with or delay of normal classroom activity or normal school function. As used herein, "normal classroom activity" means organized educational activity of students under the direct supervision of a teacher or a school administrator. Such phrase includes student activity in library areas, physical education classes, whether conducted indoors or outdoors, official assemblies and other similar gatherings. "Normal school function" means such activities as athletic contests, band concerts, school plays and scheduled on-campus lunch periods. Further, the peaceful, orderly, non-coercive distribution of written material before the commencement of classes in the morning and after the conclusion of classes in the afternoon by students lawfully on or off the premises of the school in which they are enrolled shall not be prohibited unless, under the circumstances, such distribution substantially and materially interferes with some normal classroom ac-

tivity or normal school function as those phrases are hereinabove defined.

(5) The rule must not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material, provided, however, that defendants and their successors in office may prohibit, and punish, even to the extent of expulsion, for the publication or distribution of obscene material, hereinabove defined, or of libelous material for which a cause of action may exist in some person.

Sullivan v. *Houston Independent School District*, 333 F. Supp. 1149, 1152-1153 (S.D.Tex. 1971).

For the hereinabove reasons and pursuant to the plaintiffs' prayer for relief, it is the further judgment of this Court that the following defendants' rules, or portions thereof, are unconstitutional and should be, and they are, hereby declared to be null and void:

Rule 11.05, in part, as follows:

Proviso 1.1.1.3, as being vague and overbroad. [The Court would suggest that the following would be more apt to be constitutionally acceptable: ". . . either by its content or by the manner of distribution itself, productive of, or likely to produce a substantial and material interference with or delay of normal classroom activity or normal school function."]

Proviso 1.1.1.4, as requiring prior censorship. *See, New York Times* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

Proviso 1.3.1.1, as being overbroad and impermissible. *See, Fujishima* v. *Bd. of Education*, 460 F.2d 1355 (7th Cir. 1972); *Sullivan* v. *Houston Independent School District*, 333 F.Supp. 1149, 1152 (S.D.Tex. 1971).

Proviso 1.3.1.5, as being vague, overbroad and impermissible. *See, Sullivan* v. *Houston Independent School District, supra* at 1162.

Proviso 1.3.1.6, as requiring prior censorship and restraint. *See, Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Scoville* v. *Board of Ed. of Joliet Tp. H. S. Dist. 204, etc.*, Ill., 425 F.2d 10 (7th Cir. 1970).

Rule 11.06, in total, as being overbroad and impermissible.

See, Sullivan v. *Houston Independent School District, supra*, 333 F.Supp. at 1162.

Further, this Court takes no action on the plaintiffs' request to expunge from their personal files any notations relating to this matter since no evidence was submitted indicating such a recordation.

In addition, with respect to plaintiffs' request for compensatory damages, the Court finds that plaintiffs have not established sufficient data from which the Court can properly estimate the extent of the damages, if any. Such damages sought to be recovered must be shown with reasonable certainty as to their nature and extent, and may not be based on mere speculation or conjecture. *Bond* v. *Snyder Const. Co.*, 142 Ind.App. 325, 234 N.E.2d 659 (1968).

Finally, the costs of this action, excluding attorney fees, shall be taxed against the defendants.

APPENDIX C

In the

United States Court of Appeals

for the Seventh Circuit

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973
No. 72-2030

JEFF JACOBS, ET AL., *Plaintiffs-Appellees,* v. THE BOARD OF SCHOOL COMMISSIONERS, ETC., ET AL., *Defendant-Appellants.*	Appeal from the United States District Court for the Southern District of Indiana. IP 72-C-236 WILLIAM E. STECKLER, *Judge.*

ARGUED SEPTEMBER 19, 1973— DECIDED DECEMBER 14, 1973

Before FAIRCHILD and CUMMINGS, *Circuit Judges,* and CHRISTENSEN, *Senior District Judge.**

FAIRCHILD, *Circuit Judge.* Defendants are officials of the Indianapolis school system. They appeal from a judgment enjoining the enforcement of certain rules governing the distribution by students of communicative written materials within the Indianapolis public school buildings and upon the grounds of such buildings. The named plaintiffs were or had been high school students when the action

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* Senior District Judge A. Sherman Christensen, of the District of Utah, is sitting by designation.

was started. They challenged defendants' suppression of an unofficial student newspaper, entitled the Corn Cob Curtain, in the publication and distribution of which plaintiffs had participated. The relevant rules of the Board were amended while the action was pending. The decision and judgment appealed from are reported, *Jacobs* v. *Board of School Com'rs of City of Indianapolis,* 349 F.Supp. 605 (S.D.Ind., 1972).

1. *Refusal to appoint a guardian ad litem.*

Plaintiffs were minors, represented by counsel. They alleged that activities of defendants violated their first and fourteenth amendment rights. They sued on behalf of themselves and all other high school students under defendants' jurisdiction. They primarily sought injunctive relief except that they also prayed for $150 compensatory damages and nominal or other punitive damages. Except for the prayer for damages in modest amount, plaintiffs won.

The district court denied defendants' petition for appointment of a guardian ad litem. Under the present circumstances, it is doubtful that defendants have a sufficient interest to raise this point on appeal. There is little reason to suppose that defendants would be exposed to any risk as a result of a claim that plaintiffs or class members are not bound by the judgment because there was no personal representative, next friend, or guardian ad litem. In *Roberts* v. *Ohio Casualty Insurance Company,* 256 F.2d 35 (5th Cir., 1958), relied on by defendants, and where a judgment was reversed for failure to appoint, it was the unrepresented minor who sought reversal. Nevertheless, defendants argue that the judgment should be reversed on this ground.

Rule 17(c), F.R.Civ.P., provides in part: "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Defendants apparently concede that neither the appointment of a guardian ad litem nor a protective order in lieu thereof is mandatory, and neither is required if the court

considers the matter and makes a judicial determination that the infant is protected without a guardian. *Roberts, supra*, p. 39. See *Till* v. *Hartford Accident & Indemnity Co.*, 124 F.2d 405, 408 (10th Cir., 1941); *Westcott* v. *United States Fidelity & Guaranty Co.*, 158 F.2d 20, 22 (4th Cir., 1946).

Here the question was argued and considered. We do not agree with defendants that the court's emphasis, in its oral ruling, on the fact that constitutional issues were presented, and that substantial monetary recovery was not sought, demonstrates a failure to decide the appropriate question. Moreover, there is nothing in the record which indicates that the minors were represented inadequately or that any party was prejudiced by the absence of a guardian ad litem. See *Till* and *Westcott, supra*, and *Rutland* v. *Sikes*, 203 F.Supp. 276 (E.D.S.C., 1962), aff'd on other grounds, 311 F.2d 538, *cert. denied* 374 U.S. 830.

2. *The Constitutionality of the Board's Regulations.*

During the 1971-1972 public school term, five issues of the Corn Cob Curtain were published. They contained letters, articles about politics, education, student affairs, religion, and American history, music, movie, and book reviews, poetry, and cartoons. The first four issues were distributed in Indianapolis high schools. At the time the fifth issue was ready for distribution, school authorities notified the student population that school board rules prohibit sales or solicitations on school grounds without the express prior approval of the General Superintendent. After conferring with various school officials, the named plaintiffs were informed that the Corn Cob Curtain could no longer be distributed because it contained obscene materials. Appellees refrained from distributing the fifth issue pending resolution of these issues in the courts.

At the time of the above events, Sections 11.05 and 11.06 of the Board's rules prohibited the sale or distribution of literature in the public schools without express prior approval of the General Superintendent. After the district judge stated his belief that these rules were unconstitutional

prior restraints under *Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir., 1972), the defendants amended the rules to their present form. The district court held that the amended rules were unconstitutional.

The amended rules involved are set forth at 349 F.Supp. 607-9. Rule 11.05 consists of a series of numbered items or paragraphs, designated in the district court judgment as provisos. We adopt that term, and proceed to consider the arguments made by defendants with respect to them.

(a) *Amended Rule 11.05, Proviso 1.1.1.3*

Reading provisos 1.1.1. and 1.1.1.3 together, they provide:

> "No student shall distribute in any school any literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others."

The district court held that this rule was both vague and overbroad. We agree.

It is well established that a criminal statute is void for vagueness if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *United States* v. *Dellinger*, 472 F.2d 340, 355 (7th Cir., 1972), *cert. denied* 410 U.S. 970. Vague laws are constitutionally offensive for several reasons:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a

> vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned, supra,* at 108-109, footnotes omitted.

Here, there is no criminal statute before us. Nonetheless, a student who violates amended Rule 11.05 is subject to suspension or expulsion or other disciplinary action. Proviso 1.61. We conclude that the penalties for violation are sufficiently grievous to mandate careful scrutiny for vagueness. *See generally Baggett* v. *Bullitt,* 377 U.S. 360, 374 (1964). We note the substantial danger of inadequate warnings to students, of arbitrary enforcement by teachers and principals, and of inhibition of full exercise of students' first amendment rights.

We think that proviso 1.1.1.3 is vague in defining the consequences which will make a distribution of literature unlawful. Those consequences are articulated as "a significant disruption of the normal educational processes, functions, or purposes in any of the Indianapolis schools, or injury to others." Is decorum in the lunchroom a "normal educational . . . purpose"? If an article sparks strident discussion there, is the latter a "disruption"? When does disruption become "significant"? The phrase "injury to others" is also vague. Does it mean only physical harm? Does it include hurt feelings and impairment of reputation by derogatory criticism, short of defamation, since libelous material is already covered by proviso 1.1.1.2?

Defendants argue unpersuasively that proviso 1.1.1.3 is not over-vague because of its similarity to the text of the standard by which the Supreme Court tested a precise regulation against wearing armbands in *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 514.[1] It does not at all

[1] In *Tinker,* the Supreme Court held that a state may restrain students from fully exercising their first amendment rights only if it is demonstrated that the school authorities reasonably forecast substantial disruption of or material interference with school activities or discipline. *Tinker, supra* at 514.

follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.[2]

Proviso 1.1.1.3 is also unconstitutionally overbroad. In *United States* v. *Dellinger, supra*, 357, this court stated: "The doctrine of overbreadth applies when a statute lends itself to a substantial number of impermissible applications, such that it is capable of deterring protected conduct, when the area affected by the challenged law substantially involves first amendment interests, and when there is not a valid construction which avoids abridgement of first amendment interests" (footnotes omitted). These factors are present here.

The overbreadth stems both from the vagueness described above and from the inclusiveness of the phrase "productive of, or likely to produce" in the proviso. Expression may lead to disorder under many circumstances where the expression is not thereby deprived of first amendment protection. See *Braxton* v. *Municipal Court*, Supreme Court of California, 42 L.W. 2243, (October 4, 1973). We do not read *Tinker* as authorizing suppression of speech in a school building in every such circumstance where the speech does not have a sufficiently close relationship with action to be treated as action. See *Dellinger, supra*, 360.

Where the boundaries between prohibited and permissible conduct are ambiguous, we can not presume that the curtailment of free expression is minimized. *NAACP* v. *Button*, 371 U.S. 415, 432 (1963); *United States* v. *Dellinger, supra*, 356-57. Instead the plaintiffs are permitted to attack the regulation by suggesting impermissible applications without demonstrating that their own conduct "could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). See *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972). Proviso 1.1.1.3 at least threatens a penalty for a student

[2] *e.g., Miller* v. *California*, 41 L.W. 4925. 4928 (June 21, 1973).

who distributed a controversial pamphlet in a lunchroom resulting in robust arguments or who distributed a newspaper including derogatory but not defamatory remarks about a teacher. Absent extraordinary circumstances, the school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents. See *Tinker, supra.* Finally, we note that this court lacks jurisdiction to place an authoritative limiting construction upon this state regulation in contrast with the power of federal courts with respect to interpretation of federal statutes or regulations. *United States* v. *37 Photographs,* 402 U.S. 363, 369 (1971), *cert. denied* 403 U.S. 924.

(b) *Amended Rule 11.05, Proviso 1.1.1.4.*

Reading provisos 1.1.1. and 1.1.1.4 together, they provide:

> "No student shall distribute in any school any literature that is . . . not written by a student, teacher, or other school employee; provided, however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

We have no doubt that this rule abridges first amendment rights of plaintiffs, although not for the reason assigned by the district court. Whether the student distribution of literature be viewed as individual speech or as press publication, we think that authorship by a non-school person of the material distributed is not germane to any of the constitutional standards which must be met before conduct which is also expression can be prohibited.

Defendants suggest that student distribution of materials written by non-students and outside organizations tends to produce disorder and interference with school functions, and cite the example that "stores would undoubtedly pay students to distribute flyers advertising their products." Assuming, however, some area of possible validity, the rule is overbroad. It would prohibit use of materials written by individuals from all sorts of walks

of life whose views might be thought by the students to be worthy of circulation. "Predictions about imminent disruption . . . involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 100 (1972).

(c) *Amended Rule 11.05, Proviso 1.3.1.6.*

Literature not proscribed under 1.1.1, 1.1.1.1 to 1.1.1.4, is referred to as "distributable literature." (Proviso 1.1.2). Reading proviso 1.3.1 and 1.3.1.6 together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . unless the name of every person or organization that shall have participated in the publication is plainly written in the distributable literature itself."

In *Talley* v. *California*, 362 U.S. 60 (1960), the Supreme Court held invalid a city ordinance prohibiting the distribution of handbills in any place unless the handbills disclosed the names and addresses of the persons who printed, wrote, manufactured and distributed the handbills. Noting the historical importance of anonymous publications as a vehicle for criticizing oppressive practices and laws, the Court held that the broad prohibition of the ordinance violated the first amendment. *Talley, supra*, 63-65.[3]

Anonymous student publications perform similarly within the school community; without anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. Although the rule leaves students free to distribute anonymous literature beyond the school house gate, the question here, as in *Tinker*, is whether the state has demonstrated a sufficient justification for this prohibition within the school community, where students and teachers spend a significant portion of their time. See *Tinker, supra*, 506. Defendants

[3] We note that in the recent case of *Branzburg* v. *Hayes*, 408 U.S. 665, 680 ff. (1972), the Supreme Court carefully distinguished the question of whether a newspaper reporter must respond to a grand jury subpoena from the question of whether the press could be required to publish or indiscriminately disclose all its sources.

contend that the names of persons who have "participated in the publication" of literature must be provided so that those responsible for the publication of libelous or obscene articles can be held accountable. However, here as in *Talley*, the requirement is not limited to material as to which such justification might be urged. Indeed, if the regulation be read literally, 1.3.1.6 applies only to literature the content of which is acceptable. School authorities could not reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school activities or discipline. See *Tinker, supra*, 514.

(d) *Amended Rule 11.05, Proviso 1.3.1.5 and Rule 11.06.*

Reading 1.3.1 and 1.3.1.5 together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . in immediate exchange for money or any other thing of value . . . , whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature. . . ."

Amended Rule 11.06 provides that:

> "No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus."

Plaintiffs suggest that these rules were adopted to accomplish indirectly that which can not be accomplished

directly: the blanket prohibition of the distribution of the Corn Cob Curtain and other similar student newspapers. Plaintiffs alleged the dependence of the paper upon contributions of money for survival. It can readily be observed that a ban upon the receipt of contributions on school grounds would create financial difficulties in raising the $120 to $150 necessary to publish each edition of the Corn Cob Curtain. In *Grosjean* v. *American Press Company*, 297 U.S. 233 (1935), the Supreme Court considered the constitutionality of a Louisiana tax upon the advertising revenue of newspapers with a circulation of more than 20,000 copies per week. After finding that the effect of the tax might be to destroy both the advertising and circulation of the newspapers and noting with suspicion the form of the tax, the Court concluded that the tax was a "deliberate and calculated device . . . to limit the circulation of information to which the public is entitled," in violation of the first amendment. *Grosjean, supra*, 244, 250.

Assuming, however, that the rules are not a "deliberate and calculated device" to suppress the student newspaper, it becomes necessary to analyze the justification offered by defendants. They assert the legitimacy of an interest in preventing the use of school premises "for non-school purposes—particularly commercial activities." Rule 11.06 is a general prohibition against sales of materials and solicitation of funds except for the benefit of the school. If there were any question of its intended applicability to sales by students of their unofficial newspaper, proviso 1.3.1.5 makes specific application.

We have little question of the legitimacy of the interest of the school authorities in limiting or prohibiting commercial activity on school premises by persons not connected with the school, either acting directly or through students as agents. But because students have first amendment rights within the school, as recognized in *Tinker*, we think that the propriety of regulation of their conduct involving the exercise of protected rights must be independently justified. It is not enough to say that such activity by students is similar to commercial activity by others.

Sale of the newspaper, or other communicative material

within a school, is conduct mixing both speech and non-speech elements. In order to determine whether a "sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms," we must consider whether the regulation "is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), *reh. denied* 393 U.S. 900.

Ultimately, defendants rely on the proposition that "Commercial activities are time-consuming unnecessary distractions and are inherently disruptive of the function, order and decorum of the school."

Provisos 1.3.1.2, .3 and .4 already regulate the place and manner of distribution so as to avoid interference with others and littering. They have not been challenged here. It has not been established, in our opinion, that regulation of the place, time, and manner of distribution can not adequately serve the interests of maintaining good order and an educational atmosphere without forbidding sale and to that extent restricting the first amendment rights of plaintiffs.

(e) *Amended Rule 11.05, proviso 1.3.1.1.*

Reading provisos 1.3.1 and 1.3.1.1. together, they provide:

> "No distributable literature shall be distributed by any student in any school . . . while classes are being conducted in the school in which the distribution is to be made."

It is well established that the right to use public places for expressive activity is not absolute and that "reasonable 'time, place and manner' regulations [which] may be necessary to further significant governmental interests" are constitutionally permissible. *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972), and cases cited therein. The question here is whether the Board could reasonably

forecast that the distribution of student newspapers anywhere within a school at any time while any class was being conducted would materially disrupt or interfere with school activities and discipline. See *Grayned* v. *City of Rockford, supra* at 118. In determining whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, . . . we must weigh heavily the fact that communication is involved [and] the regulation must be narrowly tailored to further the State's legitimate interest." *Grayned* v. *City of Rockford, supra* at 116-117.

We are hampered in evaluating proviso 1.3.1.1 by the paucity of evidence in the record with respect to arrangements and schedules of classes in the Indianapolis secondary schools. Nonetheless, it does appear that there are periods in the morning, around noon, and in the late afternoon when, although some classes are in session, substantial numbers of students are on the premises, are not involved in classroom activity, and are barred by proviso 1.3.1.1 from distributing and indirectly from receiving student newspapers. We conclude that the defendants have not satisfied their burden of demonstrating that the regulation banning distribution at all these times is narrowly drawn to further the state's legitimate interest in preventing material disruptions of classwork. See *Tinker, supra* at 513.

3. *Defendants' claim concerning obscenity and profanity.*

Defendants' original answer averred among other things, that plaintiffs' publications are obscene, indecent, vulgar, and profane. While the action was pending, the rules were amended so that when Rule 11.05, provisos 1.1.1 and 1.1.1.1, are read together, they provide: "No student shall distribute in any school any literature that is . . . obscene as to minors. . . ."

The district court did not directly decide defendants' claim that the existing issues of Corn Cob Curtain were obscene. Presumably the court deemed the proviso valid, for the decision indicates that the appropriate inquiry

concerning obscenity would be whether future issues of the paper would be obscene as to minors. The decision, 349 F.Supp. at 610, set forth the then controlling *Roth-Memoirs* definition of obscenity, the concept of variable obscenity permitting a less exacting standard where material is directed at children, and other limitations to be regarded in making the determination.

Necessarily we observe that proviso 1.1.1.1 lacks the specific definition of sexual conduct the description of which is prohibited as now required for a valid law under *Miller* v. *California*, ... U.S. ....., 41 L.W. 4925, 4928 (June 21, 1973).

In any event, a substantial portion of defendants' brief is devoted to what it terms the most crucial issue, "whether school authorities may constitutionally and legitimately prevent and/or punish the use of defamatory, obscene and indecent language in the school house which is contrary to the moral standards of the community."

In the first place, the issues of the Corn Cob Curtain in the record are very far from obscene in the legal sense. A few earthy words relating to bodily functions and sexual intercourse are used in the copies of the newspaper in the record. Usually they appear as expletives or at some similar level. One cartoon depicts a sequence of incidents in a bathroom. This material amounts only to a very small part of the newspapers, which are tabloid size, containing eight or twelve pages. These issues contain no material which is in any significant way erotic, sexually explicit, or which could plausibly be said to appeal to the prurient interest of adult or minor. See *Cohen* v. *California*, 403 U.S. 12, 20 (1971).

In *Miller*, *supra*, the Supreme Court limited the scope of the obscenity exception to first amendment protection to "works which depict or describe sexual conduct" and "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Clearly the newspaper issues in the record do not even approach fulfillment of this definition.

Nor need we speculate about the exact effect of *Miller* on the variable obscenity concept exemplified by *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Making the widest conceivable allowances for differences between adults and high school students with respect to perception, maturity, or sensitivity, the material pointed to by defendants could not be said to fulfill the *Miller* definition of obscenity.

It is well established that a distinction must be drawn between obscene materials and non-obscene materials containing profanity. *Cohen* v. *California*, 403 U.S. 15, 20 (1971); *Fujishima* v. *Board of Education*, 460 F.2d 1355, 1359 n. 7 (7th Cir., 1972). The only possible question is whether the Board's educational responsibilities justify its preventing the use by students in these circumstances of words considered coarse or indecent. Clearly a university can not constitutionally regulate expression on that ground. *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973). Although there is a difference in maturity and sophistication between students at a university and at a high school, we conclude that the occasional presence of earthy words in the Corn Cob Curtain can not be found to be likely to cause substantial disruption of school activity or materially to impair the accomplishment of educational objectives. *Scoville* v. *Board of Ed. of Joliet T.P.H.S. Dist. 204, Etc. Ill.*, 425 F.2d 10, 13 (7th Cir., 1970).

The injunction is broad enough to cover enforcement of the particular rules at all schools under the jurisdiction of defendants. At oral argument, plaintiffs conceded that their case was limited to the application of the rules in high schools. We therefore had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools. Should defendants apply to the district court to limit the injunction to high schools, nothing in this decision forecloses the consideration of the application on its merits.

The judgment appealed from is affirmed.

CHRISTENSEN, *Senior District Judge*, concurring in part and dissenting in part:

I am in general agreement with the majority opinion as it relates to the guardian ad litem problem and the invalidity of Provisos 1.1.1.4, 1.3.1.6, 1.3.1.5 and 1.3.1.1 of Rule 11.05, and Rule 11.06 of the appellant board.

I dissent, however, from those parts of the opinion holding that Rule 11.05, Proviso 1.1.1.3, is invalid for vagueness and overbreath* and that certain language used in the Corn Cob Curtain was not "obscene as to minors" in the high school context and thus in contravention of Amended Rule 11.05, Proviso 1.1.1.1.

And I find myself in disagreement with the conclusion "that the occasional presence of earthy words in the Corn Cob Curtain cannot be found to be likely to cause substantial disruption of school activity or materially to impair the accomplishment of educational objectives". The euphemisms employed to describe contents of the publication do not fully indicate the type of language and imagery that are given rein; whether constituting the predominant part, or merely an inescapably dominating part of any particular issue, it seems clear that expressions are used which in a high school, not to mention an elementary school would materially impair the accomplishment of educational objectives.

More likely obscene in these contexts are certain Corn Cob expressions than those involved in *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973), would be in the setting of a university. Hence, it may not be presumptuous to suppose that when a situation is evaluated corresponding to the one we have before us the majority of that court may be inclined to accept an extrapolation of the views expressed in the dissent of the Chief Justice to the effect that preclusion of the regulation of such material by school authorities would not protect values inherent in the First Amendment but would demean them (410 U.S. at p. 672), and those of Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Blackmun joined, that "insistence on equating, for constitutional pur-

* No determinative difference is perceived between this rule and its rewording which the trial court thought "more apt to be constitutionally acceptable". 349 F. Supp. at pp. 611-612.

poses, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university [high school or elementary school] which it operates serves neither the Constitution nor public education well." (410 U.S. at p. 677.)

That at oral argument "plaintiffs conceded that their case was limited to the application of the rules in high schools" does not seem to me a sufficient reason for our failure to hold as to elementary schools of all places that the trial court's decision involved error. Appellees should not be permitted to waive the contentions of appellants, who have argued here both overbreadth and invalidity of the injunction. To the extent hereinabove indicated, I am of the opinion that appellants are right on both scores. And to that limited extent it appears to me that until now this court, as well as the Supreme Court, has not committed itself to an irreconcilable view.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 17 (c) of the Federal Rules of Civil Procedure provides:

"Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other orders as it deems proper for the protection of the infant or incompetent person."

APPENDIX E

Applicable sections of present Board rules provide:

RULE 11.05

"Section 1.6.1—For violation of any of the provisions of this Rule 11.05 a student may be suspended or expelled by the principal of the school where such violation occurs and the principal or any teacher of the school may take other disciplinary action which is reasonably desirable or necessary to help any student, to further school purposes, or to prevent any interference therewith.

"Section 1.6.2—In the event that suspension or expulsion is deemed necessary, the due process provision of Public Law 162 of the laws of the State of Indiana and the rules of this Board adopted by Resolution 1030 shall apply."

The sections of Rule 11.05 and Rule 11.06, promulgated by the Indianapolis School Board, which were held *unconstitutional* provide:

RULE 11.05

"No student shall distribute in any school any literature that is—

"Section 1.1.1.3—Either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.

"Section 1.1.1.4—Not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted.

"No distributable literature shall be distributed by any student in any school—

"Section 1.3.1.1—While classes are being conducted in the school in which the distribution is to be made;

"Section 1.3.1.5—In immediate exchange for money or any other thing of value (or for an immediate promise of money or any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable literature; or

"Section 1.3.1.6—Unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

RULE 11.06

"No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, or organizations of parents and teachers or students whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus."

APPENDIX F

RESOLUTION NO. 1033, September, 1972

RESOLUTION RESCINDING SECTION 11.05 OF *POLICY & REGULATIONS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS* AND ADOPTING A NEW POLICY PERTAINING TO DISTRIBUTION AND DISPLAY OF WRITTEN AND PICTORIAL MATERIAL BY STUDENTS

WHEREAS, legal counsel has reported that Section 11.05 of the Rules of the Board has been declared unconstitutional by the Federal District Court for the Southern District of Indiana, and that a modification of said rule by providing procedural safeguards for students is advisable to avoid further litigation; and

WHEREAS, said legal counsel have prepared a proposed revision providing said safeguards;

IT IS, THEREFORE, RESOLVED that Section 11.05 be rescinded and the new rule shall read as follows:

> The Board of Education desires to encourage individual freedom from expression and creativity by students with the Indianapolis Public School System and will approve the general distribution and/or display of any written and pictorial matter which upon review will not materially or substantially (1) interfere with the proper and orderly operation of the school (2) disrupt class or school activities, or (3) infringe upon the rights of others.
>
> Prior to general distribution or display, all such material shall first be submitted to the principal or to such Review Board as may be designated within each individual school by the principal.
>
> The principal or Review Board shall review the material to determine whether or not approval for distribution or display shall be given and shall inform the student or students of a decision by 9:00 a.m. of the

second regularly scheduled school day following the date of submission of the material or such sooner time as may be reasonably practicable. If the student or students do not receive notice of a decision within the time aforesaid, it shall be presumed that the material is approved for distribution.

In the event that the material is approved for general distribution or display or no notice is given within the time set forth above, the student or students may distribute or display such material at the time and place customarily designated for such purpose within each school or, if such place is inappropriate, shall be advised of the manner, time, and place for distribution or display and shall be given a reasonable opportunity to generally distribute such material consonant with the physical facilities, operation, and educational routine of the school.

In the event that the material is not approved, the student submitting the material shall be notified in writing of the rejection and the reason for the rejection shall be included. Said student shall thereafter be entitled to a hearing by filing a charge with the Superintendent in the manner provided by Public Law 162 to the extent applicable.

In granting or denying approval, the following guidelines or rules shall apply:

1. No material shall be distributed which, either by its content or by the manner of distribution itself will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.
2. No obscene material shall be distributed.
3. No libelous material shall be distributed.
4. No material shall be distributed unless the editor or some person in charge of the material verifies the identity of the author(s) of the material.
5. No material shall be distributed which contains in-

decent, vulgar or profane language, cartoons or pictures.

6. No material shall be distributed which advocates lawlessness or a disregard of school rules.

7. No material shall be distributed which subjects school administrators and personnel to ridicule. Responsible criticism shall be allowed.

Where the principal or Review Board deem it desirable, each school may enact supplemental regulations relating to the general distribution or display of student material within the scope and spirit of this policy.

The purpose of this policy is to encourage responsible student activity and to this end the policy is to be applied reasonably and responsibly taking into consideration the rights of the students, faculty, and school administration in conjunction with the physical facilities and orderly operations of the school.

For violation of this rule, a student may be suspended or expelled from school or the administrators or teachers of the school corporation may take any other action reasonably desirable or necessary to help any student, to further school purposes, or to prevent an interference therewith.

LIBRARY
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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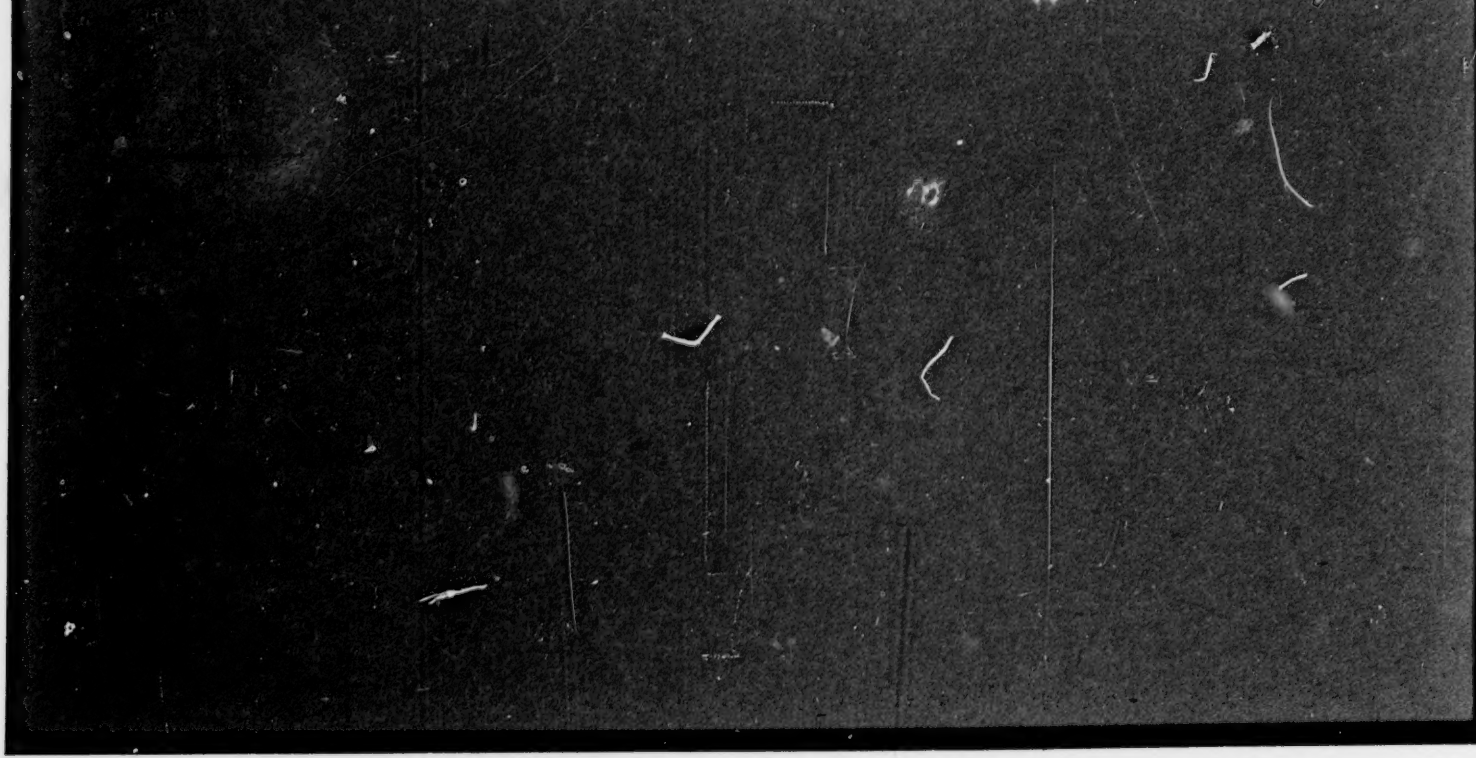

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ON PETITION FOR WRIT OF CERTIORARI
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APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (App. B of Petition) is reported at 349 F. Supp. 605. The opinion of the Court of Appeals for the Seventh Circuit and the concurring in part and dissenting in part opinion (App. C of Petition) are reported at 490 F. 2d 601.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

The following statement of questions presented is set forth solely to clarify the issues which were adjudicated by the courts below. Respondents do not believe that the restated, clarified issues warrant review of the judgment and opinion of the Seventh Circuit.

1. Whether public school administrators and board members may constitutionally prohibit the sale of a student publication or the distribution of a student publication in exchange for voluntary contributions on school premises as provided in Rules 11.06 and 11.05, Section 1.3.1.5, Rules of the Board of School Commissioners of the City of Indianapolis?

2. Whether Rule 11.05, Section 1.1.1.3, Rules of the Board of School Commissioners of the City of Indianapolis, which provides:

> "No student shall distribute in any school any literature that is- - - - either by its content or by the manner of distribution itself, productive

of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others."

is unconstitutional as being vague and overbroad, and as an unconstitutional prior restraint on the First Amendment rights to freedom of speech, press and association of public high school students?

3. Whether Rule 11.05, Section 1.3.1.1, Rules of the Board of School Commissioners of the City of Indianapolis, which provides:

"No distributable literature shall be distributed by any student in any school while classes are being conducted in the school in which the distribution is to be made."

contravenes public high school students' rights to a free press, thought and expression as guaranteed by the First Amendment, United States Constitution?

4. Whether Rule 11.05, Sections 1.1.1.4 and 1.3.1.6, Rules of the Board of School Commissioners of the City of Indianapolis, which provide:

Section 1.1.1.4: "No student shall distribute in any

school literature that is not written by a student, teacher, or other school employee; provided, however, that advertisements that are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

Section 1.3.1.6: "No distributable literature shall be distributed by any student in any school unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

are unconstitutional prior restraints in that they contravene public high school students' First Amendment rights to freedom of press, speech, thought and expression?

5. Whether the Corn Cob Curtain is an obscene publication?

6. Whether minor plaintiffs, real parties in interest in litigation challenging the constitutionality of public high school regulations which require prior unilateral administrative approval of student publications before distribution and which prohibit the sale and

distribution of student publications, may sue in their own names in federal district court pursuant to Rule 17(b) and (c), Federal Rules of Civil Procedure?

Constitutional, Statutory and Regulatory Provisions Involved

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, Rule 17(c) of the Federal Rules of Civil Procedure, and the applicable Rules of the Board of School Commissioners of the City of Indianapolis are set forth in Appendices D, E and F of the Petition.

Statement of the Case

The jurisdiction of the district court was invoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1343, 2201 and 2202.

During July, 1971, plaintiffs, public high school students in the Indianapolis Public Schools, met for the purpose of forming an unofficial student newspaper entitled the "Corn Cob Curtain." Five issues of the "Corn Cob Curtain" were published by the plaintiffs during the 1971-1972 public school term. The first four issues of the "Corn Cob Curtain" contained poetry, opinion letters, articles

on student rights, the authority of school administrators, beading, student walkouts, public aid to private schools, draft counseling, reviews of musical performances, book reviews, commentaries on censorship, student union organization, student councils, curfews, and had cartoons containing opinion commentary.

The "Corn Cob Curtain" was sold to students, faculty members and administration officials by the plaintiffs although no set price was established. In exchange for copies of the unofficial student newspaper some students and faculty members made voluntary contributions, while other copies of the "Corn Cob Curtain" were provided at no cost.

On February 9, 1972, the plaintiffs were notified by the Principal of Arsenal Technical High School in a written bulletin that:

> "It is against school board rules to sell any item on school grounds without the express prior approval of the General Superintendent."

The rule referred to in the Arsenal Tech bulletin was Chapter XI, Sections 11.05 and 11.06 of the Policies and Regulations of the Board of School Commissioners of the City of Indianapolis which provided:

Section 11.05: "No persons shall exhibit any book, map, pamphlet or other article in the public schools or on school premises unless authorized to do so by the General Superintendent."

Section 11.06: "No sales, collections of money or of any articles, nor any contests or exhibits shall be conducted or permitted by or in any school without the express prior approval of the General Superintendent."

At this time Volume I, Issue 5 of the "Corn Cob Curtain" was ready for distribution by the plaintiffs, said issue containing a brief telephone directory, letters to the editor, articles on education, the draft, amnesty to war resisters, new academic courses, Appalachia, how West Virginia became a state, state legislative proceedings, school board meetings, the Baha'i faith, musical previews, poetry and a cartoon containing opinion commentary.

From February 9, 1972, until October 19, 1972, plaintiffs refrained from distributing copies of the "Corn Cob Curtain" in, on, or about the premises of any public high school pending determination of the issues by the district court.

Plaintiffs had filed their complaint in the district court on June 1, 1972.

The defendants, the Board of School Commissioners of the City of Indianapolis, and its individual members, the Superintendent and Administrative Assistant of the Indianapolis Public Schools, during the litigation twice amended their rules which continued and perpetuated prior restraints upon the plaintiffs' rights to freedom of press, speech, thought and expression. Since October 19, 1972, the date on which the district court entered its permanent injunction against the defendants, plaintiffs have published, distributed and sold or received voluntary contributions for subsequent issues of the "Corn Cob Curtain." On December 14, 1973, the Court of Appeals for the Seventh Circuit affirmed the judgment of the district court.

Certain "Questions Presented" Were Not Properly Raised Below

Petitioners have attempted to present several matters under the rubric of "Questions Presented" which are not proper grounds for the grant of a writ of certiorari by this Court. Where issues are not urged and briefed below, and where they have not been raised nor actually considered by the Court of Appeals, they are not properly before this Court. Mere mention or even brief discussion of a matter not properly raised does not bring it before this Court. Ivrrell v. District of Columbia, 243 U.S. 1 (1917); Lawn v.

United States, 355 U.S. 339 (1958); Neely v. Eby Construction Co., 386 U.S. 317 (1967); and Adickes v. Kress and Co., 398 U.S. 144, n. at 147 (1970).

Petitioners' question 1.a. concerning the comparison of constitutional standards for vagueness and overbreadth applicable to criminal statutes and to public school rules was not adequately urged or briefed below. The question attempted to be presented was mentioned in the dissent of Judge Christensen who speculated about how this Court might react to the "preclusion of the regulation of such material [the "earthy words" contained in the "Corn Cob Curtain"] by school authorities..." Jacobs et al, 490 F.2d at 611. The majority did not preclude all regulation of such material, however, and the speculative mention in the dissent does not satisfy this Court's traditional rules concerning issues properly presented to it.

Petitioners have also attempted to frame all "Questions Presented" in relation to both elementary and secondary schools. The majority made it explicit that it "had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools." Jacobs et al, 490 F.2d at 610. It is clear from the record that all proceedings at the District Court level concerned a publication by high school students which was received by high school students, teachers and administrators. The Court of Appeals recommended

after the above quoted passage that petitioners apply to the District Court for a limitation of the outstanding injunction to high schools. Rather than make such an application in good faith, petitioners are attempting to have this Court review the decision of the Court of Appeals as if it applied to the elementary students in their schools. Respondents have at no time either briefed or argued such an issue, and it is not properly before this Court. A proper evaluation of the petition for certiorari requires, therefore, that all arguments attempting to make the decision below applicable to elementary schools be disregarded.

There Is No Conflict of Decision

Petitioners have naturally tended to emphasize what they perceive to be conflicts among the Courts of Appeals which this Court must resolve. The regulations invalidated in the proceedings below, however, are ones which differ blatantly from those outside of the Seventh Circuit upon which petitioners rely for the appearance of conflict. Petitioners' regulations which go far beyond anything considered in prior appellate decisions are §1.1.1.3 [the "likely to produce" regulation] and §1.3.1.1 [the "classes being conducted" rule].

The most significant case which petitioner finds in conflict with the decision

below is Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971). They claim that a rule approved in Eisner is "virtually identical" to the "likely to produce" rule. Petition at 10. They also claim that the "likely to produce" rule bears a "similarity" to the standard established in Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969). Petition, at 11. The "likely to produce" rule adopted by petitioners differs in one important respect from the rule in Eisner and the standard in Tinker: they each require "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." Tinker, supra, at 513. We have referred to §1.1.1.3 as the "likely to produce" rule to emphasize the degree to which it departs from the Tinker and Eisner standards.

Eisner requires a finding that material proposed to be distributed "will interfere," "will cause violence or disorder," or "will constitute an invasion of the rights of others." Eisner, supra, at 805. The "likely to produce" rule lends itself readily to the suppression of publications upon "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Tinker supra, at 509. Furthermore, the "likely

in the pleadings before this Court. Such language does not appear in any of the other decisions upon which they rely to demonstrate the existence of a conflict. It is submitted that the language of the "likely to produce" rule by itself distinguishes the instant case from those with which it allegedly conflicts.

The "classes being conducted" rule is also unique among the Courts of Appeals' decisions on the regulation of student publications. Respondents have argued since the promulgation of the rule that it constitutes, by itself, an absolute ban on the distribution of student publications. Petitioners' brief before the Court of Appeals was somewhat more candid on this issue than the discussion before this Court. Appellants' Brief, 41 - 45, Petition 19 and 20. In the brief below, petitioners graphically emphasized that since it was conceded that they had the power to reasonably regulate the place of distribution, they were utilizing that power by designating as the "place" subjected to regulation an entire school. The Court of Appeals recognized the "classes being conducted" rule for the device it clearly is. Jacobs et al. 490 F.2d at 609. No other Court of Appeals has been presented with such a bald prohibition against distribution of publications.

in any schools if classes are being conducted in the school in question.

The Court of Appeals properly relied upon Grayned v. City of Rockford, 408 U.S. 104 (1972) and its analysis relying upon Tinker, supra, in finding the "classes being conducted" rule constitutionally deficient. Ironically, however, petitioners' attempt to rely upon Grayned and its requirement for careful analysis of the environment in which speech-related activities could be regulated as somehow supporting their total prohibition of speech-related activities at all times so long as the unrelated prerequisite of a class in session. While Grayned requires that First Amendment rights be subjected only to reasonable regulations "narrowly tailored to further the State's legitimate interest," the "classes being conducted" rule is a regulatory sledge hammer incapable of application on a case by case or other reasonable basis. Grayned, supra, at 116-117. Since the entire case can be disposed of by affirming the Court of Appeals' decision on the "classes being conducted" rule, and since that rule is not the subject of any other federal appellate decisions, petitioners have failed to present a sufficiently compelling case to warrant a grant of certiorari.

The decisions in other judicial circuits upon which petitioners have attempted to rely make it clear that none of them would have permitted the "classes being conducted" rule to stand. The Fifth

Circuit Court of Appeals in Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972) discussed time, place, and manner of distribution limitations, and it was made clear that reasonableness and equality of application were the touchstones for evaluating such rules. The Fourth Circuit in Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) would require the showing of substantial facts which supported a reasonable forecast of substantial disruption or material interference with school activities on account of the distribution of printed material. That Court clearly would not approve a blanket prohibition against distribution of any student publication at any time in any school simply because one or more classes were in session at some location within the school. The Ninth Circuit in Hatter v. Los Angeles City High School Dist., 452 F.2d 673 (9th Cir. 1971) specifically upheld the First Amendment rights of high school students to pass out leaflets before school on a street corner across from the school grounds. It clearly would not approve of the "classes being conducted" rule. The position of the Seventh Circuit is clear not only on the basis of the instant case, but also on the basis of Scoville v. Board of Education, 425 F.2d 10, cert. den. 400 U.S. 826 (1970) and Fujishma v. Board of Education, 460 F.2d 1355 (7th Cir. 1972). Without summarizing the numerous District Court decisions in other circuits, it should be sufficient to say in summary fashion that none of them would approve the "classes being conducted" rule.

Petitioners' Prior Restraint Rules Are Not Supported by Decisions Outside the Seventh Circuit

Petitioners' have argued in effect that their prior restraint rule would be approved in Circuits other than the Seventh Circuit. It is clear, however, that petitioners' rules would not be approved even in the Circuits which have approved some variety of prior restraint rules. This Court is not, therefore, presented with any meaningful conflict among the Circuits which requires present resolution. Having already indicated the fact that the Second Circuit in Eisner would not approve of the "likely to produce" or "classes being conducted" rules, it should also be pointed out that the Second Circuit would not approve petitioners' prior restraint rules. Indeed, it cannot be stated too strongly that petitioners have wholly failed to disclose to this Court that each of the Court of Appeals' decisions which they characterize as being in conflict with the Seventh Circuit involved in each instance holdings that rules under which school authorities were acting were vague, overbroad, or inadequately delineated with respect to procedure. In Eisner, the Court declared unconstitutional a rule which read as follows:

> No person shall distribute any printed or written matter on the grounds of any school or in any school building, unless the

distribution of such material shall have prior approval by the school administration.

The rule there declared unconstitutional is all but identical to one of petitioners' rules which was the basis for the commencement of these proceedings, and which had been explicitly held unconstitutional by the Seventh Circuit in Fujishma, supra. While making the briefest allusion to the procedural requirements enunciated in Eisner, petitioners failed to disclose that the Court there found the regulations in question constitutionally defective for failing to provide a procedure for prior submission to school administrators, and that it required compliance with Freedman v. Maryland, 380 U.S. 51 (1965) procedural methods. The prior restraint rules, even as amended by petitioners, in the instant case would clearly not be approved by the Eisner court on the same grounds. Furthermore, one of the most significant factors which saved the school in Eisner any degree of prior restraint was the fact that the rules there did not authorize any punishment of students who published literature that could be censored under the regulations. The Eisner court would not, therefore, approve of petitioners' prior restraint rules, particularly §1.6.1 which provides for suspension or expulsion of students violating petitioners' rules on the subject.

Petitioners also point to Shanley as an indication that their rules would be

nstitutionally permissible in the Fifth rcuit. It must be noted, however, that was the case in Eisner, the Court i.. anley held unconstitutional yet another anket prohibition against distribution literature "of any kind, sort, or type thout the specific approval of the incipal." And, once again, it was found at First Amendment rights could not be equately protected in the absence of andards and guidelines stating clear and monstrable criteria that school adminis- ators could utilize to evaluate materials omitted to them. The Fifth Circuit also and that prohibition against "distribu- ons" or "attempts to distribute" consti- ted "blunderbuss regulation" which was trary to the First Amendment. There- re, even though the Fifth Circuit indi- ed that it might approve of prior traint regulations, it stated that such ulations must clearly show the rela- nship between preventing "distribution" the prevention of material and sub- ntial disruption of school activities. re is nothing to indicate that the th Circuit would find the total absence such guidelines in petitioners' prior traint rules anymore palatable than did Seventh Circuit.

The Fourth Circuit also found that a ulation prohibiting the distribution "any advertisements, pamphlets, printed erial, written material, announcements other paraphernalia without the express mission of the principal of the school" unconstitutional. Once again, a regu-

lation of the type that petitioners had at the commencement of these proceedings was declared unconstitutional. Once again, another Circuit found that the principal vice in such a regulation was the absence of criteria to be followed by the school authorities as well as in the absence of any procedural safeguards for review of their decisions. Petitioners' prior restraint rules, lacking as they do any criteria for guidance of school authorities or adequate procedures for the protection of students would not be upheld in the Fourth Circuit. The fact that Courts of Appeals have indicated their willingness to approve some form of prior restraint in student publications does not create an actual conflict in view of the complete inadequacy under those Courts' standards of petitioners' rules. Perhaps the clearest indication of the absence of criteria in those rules is §1.1.1.1 which holds that "no student shall distribute in any school any literature that is obscene as to minors."

This Court Should Not Grant Certiorari for the Purpose of Writing An "Obscenity" Rule for Petitioners

The most convincing demonstration of the absence of criteria in petitioners' prior restraint rules is that they have written a blanket prohibition against materials "obscene as to minors" and asked this Court on certiorari to "settle,

the crucial issue of the extent of the power of school officials to either prevent or punish the use in elementary and secondary schools by minors of such language as 'f---, screw, and eat shit'" Petition p 20. Obviously not being able to claim a conflict among the Circuits on this issue, petitioners have not so much as even attempted to provide criteria for the regulation of this area. They simply argue that different standards may be appropriate for high school [and elementary despite the observations above on the scope of these proceedings] students than are appropriate for the adult community. The Court of Appeals, and respondents, have had no difficulty with that proposition as exemplified by Ginsberg v. New York, 390 U.S. 629 (1968). The Court found, and petitioners offer no suggestions to the contrary, that the "Corn Cob Curtain" did not contain erotic material as such. It must be noted as well, that petitioners reiterate to a degree what amounts to harping on the subject that the troublesome "earthy words" recognized below are found "throughout" the "Corn Cob Curtain." Petitioners' assertions that such material appears "throughout" amount to a bad faith claim in view of the specific finding by the Court of Appeals that the "material amounts only to a very small part of the newspapers" and in the total absence of any additional evidence submitted by petitioners. Jacobs et al, supra, at 610.

From the very commencement of these proceedings, petitioners have continually pointed to the same three or four examples of language which they have found to be offensive. The repeated statement that allegedly obscene material appears "throughout" is both false and deliberately misleading. "Corn Cob Curtain" is one of the most moderate and mild mannered student publications of its kind.

Although petitioners have not specifically claimed them as authority motivating a grant of certiorari in this case, the District Court decisions upholding disciplinary treatment for students using "earthy words" predate this Court's decision in Cohen v. California, 403 U.S. 15 (1971) See, e.g. Schwartz v. Schuker, 298 F. Supp. 238 (DC NY 1969); and Baker v. Downey City Board of Education, 307 F. Supp. 517 (DC Cal. 1969). While arising in a state university and involving somewhat different language, this Court's recent majority opinion in Papish v. University of Missouri, 410 U.S. 667 (1973) does not support the position being advocated by petitioners. See, also, Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

One additional point concerning the "earthy words" issue clearly indicates that this Court should not grant certiorari on that ground. Although petitioners have complained about the handful of such words they managed to find in "Corn Cob Curtain," what they are really asking this Court to do is not declare such words ob-

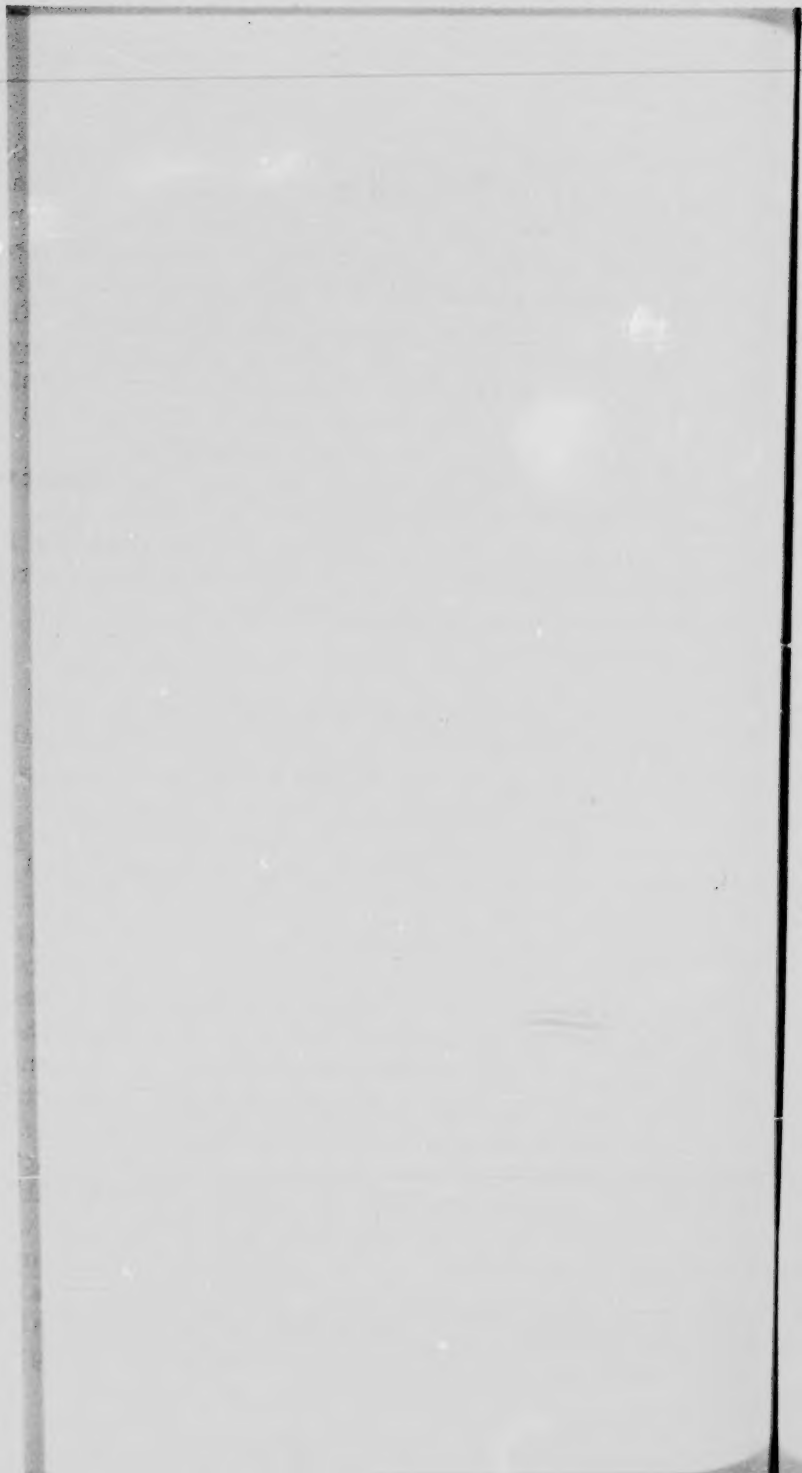
scene in and of themselves. Rather, petitioners are asking this Court to tell them what their regulation against the distribution of literature "obscene as to minors" means. At the very least, petitioners should have provided guidelines and criteria, and they should have presented this Court with examples of applications which could be reviewed meaningfully. At the time the issues of "Corn Cob Curtain" were distributed in petitioners' schools, however, the "obscene as to minors" rule did not exist. Rather, the rule which required express prior approval of the superintendent, and which has been rejected by all Courts of Appeals that have reviewed such a rule, was in effect. The only evidence that exists in the record of these proceedings on the subject consists of abortive attempts by petitioners' counsel to embarrass various individual respondents by making them read the allegedly offensive language out loud. Petitioner also introduced generalized and conclusory self-serving testimony by school administrators who indicated nothing but the most vague and speculative impressions on the subject.

Other Questions Presented By Petitioners Do Not Warrant Review

Petitioners have argued that the injunction of the District Court in these proceedings is "fatally overbroad." As pointed out above, however, petitioners

have failed to avail themselves of the opportunity indicated by the Court of Appeals to apply to the District Court for a narrowing of that injunction. They additionally have attacked the injunction on the basis of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) and Near v. Minnesota ex rel Olson, 283 U.S. 697 (1931). Recognizing Mr. Justice Rehnquist's dissent in Papish, supra, in which he applied Chaplinsky to a newspaper, it is submitted that the "fighting words" concept upon which petitioners appear to be relying has not traditionally been applied to written words. See, Papish, supra, at 676 (Rehnquist diss).

Petitioners claim that certiorari should be granted because of an alleged conflict with the Second Circuit decision in Katz v. McAulay 438 F.2d 1058 (2nd Cir. 1971), cert. den. 405 U.S. 933. Katz, however, as parenthetically recognized by petitioners [Petition, 17] involved at least a discretionary ban. As not pointed out by petitioners, however, Katz involved a statewide rule that had been in effect for at least twelve years, and upon the basis of which some seventy-five to one hundred requests to use school property for various kinds of solicitation of funds had been denied. Most importantly, however, Katz did not involve the distribution of an underground newspaper for which donations were given to those distributing it. On the contrary, it involved the distribution of a one page leaflet and simultaneous solicitation of funds to be given



to certain persons who were on trial in federal court. The solicitation was, therefore, for an outside activity. It did not involve a concomitant to the distribution of a student publication.

The Court of Appeals was willing to assume that the rules on solicitation were not a "deliberate and calculated device" to suppress the "Corn Cob Curtain." There is no escaping the fact, however, that the rules in question were not promulgated until after the commencement of this litigation. Indeed, they were promulgated as a response to this litigation and the District Court's initial holding that the original prior restraint rules were unconstitutional. There is no evidentiary basis for the promulgation of the anti-solicitation rule in general in the record of these proceedings.

Petitioners also seek certiorari on grounds which amount little more to an assertion of error on the part of the court below. Such issues as the rules prohibiting anonymity and requiring school related authorship do not, it is submitted, present an adequate basis for the grant of certiorari. Petitioners are simply claiming that the Court of Appeals was wrong in its decision on those issues. No significant conflicts, federal constitutional principles, or other traditional considerations are put forward, however, which would motivate review.

Appointment of a Guardian Ad Litem For Minor Plaintiffs Is Not Mandatory

Rule 17(a), Federal Rules of Civil rocedure, provides, inter alia, that (e)very action shall be prosecuted in the ame of the real party in interest." The eaning and intent of this statement is nalyzed in 3A J. Moore, Federal Practice 17.02, at 53 (2d ed. 1970) to be:

> "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."

Se , 6 Wright and Miller, Federal ractice and Procedure, §1542 at 639 1971). Herein, plaintiffs are the partes who, by the substantive law, are seeking to enforce their fundamental constitutional rights. Indeed, it is now well stablished that high school students may ommence actions seeking relief for infringement of constitutional rights under 2 U.S.C. §1983, Fujishima, et al. v. oard of Education, 460 F.2d 1355 (7th Cir. 972), and that high school students are persons" entitled to First and Fourteenth mendment protections. Scoville v. Board f Education of Joliet Tp. H.S. Dist 204, t al, 425 F.2d 10, 13 (7th Cir. 1970); inker v. Des Moines Community School istrict, 393 U.S. 503 (1969). Our law learly recognizes the independent constiutional rights of minors without requiring such rights to be derived from

those possessed by adult parents. As Mr. Justice Fortas said: "Under our constitution, the condition of being a boy does not justify a Kangaroo Court." In Re Gault 387 U.S. 1, 28 (1967).

The substantive constitutional right which plaintiffs have sought to protect is the right of public high school students to distribute and sell a student publication in the public schools of Indianapolis without prior censorship.

Defendants' reliance upon Roberts, et al v. Ohio Casualty Insurance Company, 256 F.2d 35 (5th Cir. 1958), is misplaced. In Roberts it was the unrepresented minor who obtained a reversal for failure to appoint a personal representative. Where the court makes a judicial determination that a minor is protected without the appointment of a guardian ad litem, it is unnecessary to appoint such a representative, especially where there is no showing of inadequate representation or prejudice to any party. Roberts, supra at 39; see, Till v. Hartford Accident & Indemnity Co., 124 F.2d 405, 408 (10th Cir. 1941); Westcott v. United States Fidelity & Guaranty Co., 158 F.2d 20, 22 (4th Cir. 1946); Rutland v. Sikes, 203 F. Supp 276 (E.D.S.C. 1962), aff'd on other grounds, 311 F.2d 538 (4th Cir.), cert. denied 374 U.S. 830.

Conclusively, appointment of a guardian ad litem is unnecessary in the case at bar.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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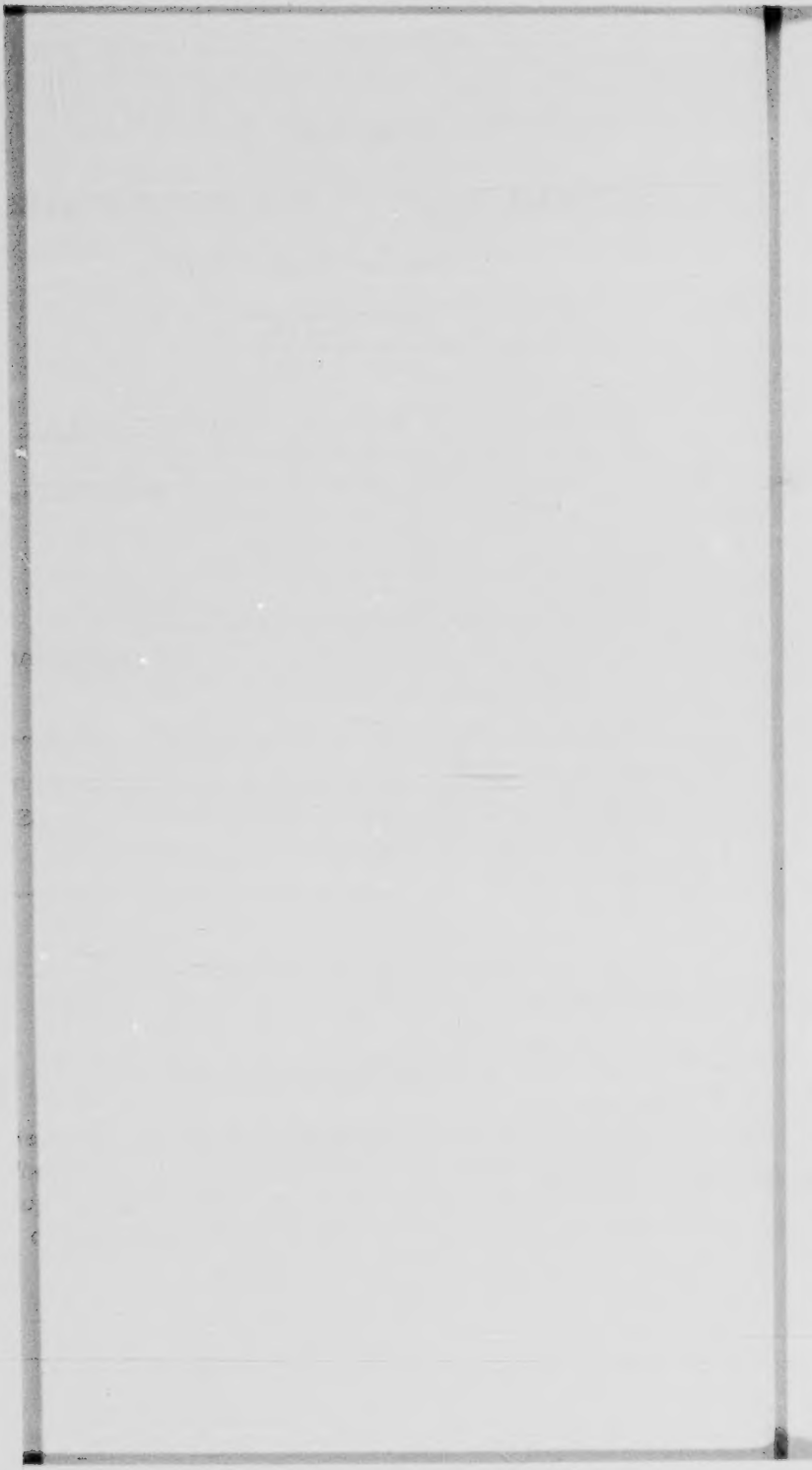
PETITIONERS' REPLY BRIEF

Questions Rewritten

Respondents' obvious purpose in completely rewriting the questions presented by petitioners is to hopefully omit certain of petitioners' questions (questions 1, 3 and 4) presented and to



confuse rather than clarify the remaining issues (particularly question 5).

Respondents' alleged "justification" for this most irregular and highly improper attempt to select and confuse the questions presented to this Court for review is that an issue in one of the petitioners' questions (1 a) was neither urged and briefed below, nor considered by the Court of Appeals. This simply is not true. Question 1 a concerns whether the Appellate Court erred by applying to Board regulations the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes.

Petitioners' Brief in the Seventh Circuit in discussing the question of whether the rules in question were void for vagueness or overbreadth, urged the Court not to equate a school regulation with a statute, stating:

> "Furthermore, many courts have stated that school regulations because of the very nature of the educational institution and its goals and purposes should not be tested by the same requirements of specificity as are state statutes. See, e.g., Speake v. Graham (Miss. 1970), 317 Fed. Supp. 1253. 'Flexibility and elbow-room are to be preferred over specificity.' 317 F. Supp. 1265."

The first sentence of this quotation was taken from Jones v. State Board of Education (D.C.

Tenn. 1968), 279 F.Supp. 190, aff'd (6th Cir.) 407 F.2d 834, cert.gr. 396 U.S. 817, cert. dism'd. 397 U.S. 31, Reh.den. 397 U.S. 1018. This same brief also cited Baker v. Downey City Board of Education (D.C. Cal. 1969), 307 F. Supp. 517, and Sill v. Pennsylvania State University (3rd Cir. 1972), 462 F.2d 463 on the issue of vagueness and overbreadth. Thus the only case on this issue in the Petition for Writ of Certiorari which was not in Petitioners' Appellate Brief was Esteban v. Central Missouri State College (W.D. Mo., 1968), 290 F.Supp. 622, aff'd 415 F.2d 1077 (8th Cir. 1969), cert. den. 398 U.S. 965.

It is absurb to challenge petitioners' right to present this question for review since it was an important basis for the opinion of the Court of Appeals. The Appellate Court in declaring the Board rules unconstitutional for vagueness and/or overbreadth explicitly applied the same strict standards applicable to statutes, particularly criminal statutes. The dissent, recognizing this, stated that a majority of this Court might be inclined to accept the view of three of its members in Papish v. University of Missouri Curators, 410 U.S. 667, 677 (1973), that "insistence on equating, for constitutional purposes, the authority of the state to criminally punish with its authority to exercise even a modicum of control over the university (high school or elementary school) which it operates serves neither the constitution nor public education well."

Thus petitioners' question 1a was properly raised and briefed below and considered by

the Court of Appeals.

Elementary Schools

It is abundantly clear that the Board rules and injunction in question apply to both elementary and secondary schools, in fact, to all "students in the Indianapolis Public School system." (Petition, App. p. 6A) Since neither respondents nor the Court of Appeals deny this fact, it seems most strange that respondents would now object for the first time to petitioners' references to elementary schools. To imply that the proceedings below were limited to high schools and that respondents did not have an opportunity to brief or argue the application of the rules and injunction to elementary schools is a complete misrepresentation of the history of this litigation.

There is no question but that the case in the District Court concerned all Indianapolis public schools; the petitioners Brief in the Court of Appeals made countless references, arguments and discussed cases concerning elementary students. Respondents said absolutely nothing in their complaint, in the trial court proceedings or in their Court of Appeals reply brief to indicate that they believed the rules and subsequent injunction did not apply to elementary schools or that the Board's many references to elementary schools were irrelevant or improper.

The Court of Appeals stated that:

"The injunction is broad enough to cover enforcement of the particular rules at all schools under the jurisdiction of defendants." (Jacobs v. Board (7th Cir. 1973) 490 F.2d 601 at 610)

The Court then upheld the District Court's injunction and decision declaring Board rules unconstitutional yet at the same time refused to hold whether it would be constitutional to apply these rules to elementary schools. The dissent took exception to this obvious contradiction and the court's "failure to hold as to elementary schools of all places that the trial court's decision involved error." (Jacobs, supra, p. 611.)

Since the rules were all declared facially unconstitutional, it is the respondents who lack good faith in now implying that they could be validly applied to elementary schools. In addition, the District Court's Order permanently enjoined the Board from the promulgation or enforcement of any rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material ---." (Petition App. p. 14.)

Rule 1.1.1.3 (Disruption Rule)

Respondents claim that Rule 1.1.1.3 differs blatantly from Tinker and Eisner[1] and

1. Tinker v. Des Moines Independent School Dist., (1969), 393 U.S. 503; Eisner v. Stamford Board of Education (2nd Cir. 1971) 440 F.2d 803.

goes far beyond anything considered in prior Appellate decisions. This is a gross misinterpretation of those two cases.

Respondents base their entire argument on the phrase "likely to produce" in this rule which the District Court did not find vague or overbroad. In fact, the trial court also used the same phrase in its rewording of a rule likely to be found constitutionally acceptable. (Petition App. p. 14) The Seventh Circuit held that 1.1.1.3 was vague only in defining the consequences which would make a distribution of literature punishable. It did not find the phrase "likely to produce" vague as respondents imply. Instead, the Appellate Court held the phrase "productive of or likely to produce" overbroad simply because it erroneously believed that students are constitutionally entitled to distribute literature which causes disorder or a significant disruption in the school. (Jacobs, supra, p. 606.)

The Board doubts that many appellate courts would find the phrase "likely to produce" either vague or overbroad, especially after a careful reading of Tinker, supra, which emphasized that a reasonable anticipation or forecast of significant disruption warrants action by the school to prevent it. It is obvious in Tinker that where there is potentially disruptive conduct, or interferences with the work of the school or the rights of other students or threats of violence on the school property, reasonable action by school authorities is constitutionally permitted.

It was also suggested in Quarterman v. Byrd (4th Cir., 1971), 453 F.2d 54 at 59 n. 10, that:

> "Courts may well take note of the significant difference between symbolic speech, especially when directed towards a non-school matter, and the distribution of an underground newspaper in assessing the reasonableness of a judgment of likely school disruption. --- Tinker and Burnside (Burnside v. Byers (5th Cir.), 363 F.2d 744) involved worn symbols which were viewed by comparatively few students, while underground newspapers have a theoretically unlimited student readership and thereby a potentially more disruptive influence."

Although courts hold that school authorities may act to prevent an actual disruption, as a practical matter, since disruption Rule 1.1.1.3 authorized only subsequent, not prior restraints, it would be most unlikely that any student would be subjected to disciplinary measures for distribution of literature which did not, in fact, cause an actual disruption of the school.

1.3.1.1 (Distribution during class hours)

Much of respondents' brief is devoted to attempts to distort the rule prohibiting distribution while students are required to be in class. (Rule 1.3.1.1) Respondents are well aware that

this rule does not subject students to disciplinary measures for selling literature "at any time in any school simply because one or more classes were in session at some location within the school." (Respondents' Brief, p. 14) This rule simply disallows distribution during class time when students are required to be in the classroom. It is a misrepresentation to imply that only a few classes may be in session in a small part of the school when the fact is that classes are conducted continuously (except at lunchtime) throughout the entire school until a certain hour. Since none of the cases cited by respondents even discussed a similar rule, they can scarcely be valid authority for invalidation of the Board rule. For example, Hatter v. Los Angeles City High School Dist. (9th Cir. 1971), 452 F.2d 673, was concerned only with the rule which disallowed distribution before school commenced on property which did not even belong to the school.

Prior Restraint

Respondents' discussion of the issue of prior restraint is so irrelevant, misleading, and confusing that it is necessary to set the record straight. An important issue in this case is whether the United States Constitution prevents a school board from adopting reasonable rules which would require prior approval by school authorities of literature before its distribution in elementary and secondary schools and whether the second amendment of Board rule 11.05 (reprinted in Appendix F of Petition) which requires prior approval is reasonable and constitutional.

The original Board Rule 11.05 which required prior approval of student literature without providing any safeguards was the basis for the complaint filed against the Board. However, the invalidation of this original rule was not appealed and is not an issue in this case, as respondents' imply.

However, the validity of the Board's first amendment of Rule 11.05 is an issue. (Question 4) This rule (Petition App. F) also requires review and approval of student literature prior to distribution in the Indianpolis Public Schools, but it incorporates guidelines and procedural safeguards as suggested by other Circuits (2nd and 5th). The trial court, however, made it clear that no prior restraints would be tolerated and ordered the Board to further amend its rules. The Board complied with this order and submitted a second amendment of Rule 11.05 (the present rules) which allow absolutely no pre-distribution review, approval or censorship. This second amendment of Rule 11.05 (reprinted in Petition, Appendix 6A-9A), while not permitting any prior restraints did subject students to subsequent restraints (disciplinary measures ranging from reprimand to expulsion) if they distributed literature which was obscene as to minors, libelous, or cause a significant disruption, etc.

The trial court also declared certain sections of this second amendment unconstitutional (reprinted Petition, Appendix pp. 33-34A) The sections regulating obscene and libel-

ous materials were held valid and thus are not issues in this case, contrary to respondents' assertion. The sections of this second amendment which were held unconstitutional were appealed and are issues (covered by Questions 1 and 2).

With this background in mind, and the fact that only one rule (first amendment of 11.05) allowed any prior censorship or restraint, respondents' discussion of question 4 becomes completely unintelligible and irrelevant. Respondents did not even discuss the issue of whether the invalidation of the first amendment of Rule 11.05, which rule carefully followed the guidelines suggested by the Second and Fifth Circuits for a valid prior restraint regulation, was in conflict with those circuits. Instead, much of respondents' argument is based on whether original Rule 11.05 (prior review without safeguards) conflicts with decisions of other circuits. Yet this rule is not an issue since it was not appealed. Respondents also mention the obscenity rule which was held valid and therefore is not an issue. Most of respondents' "prior restraint" argument concerns the second amendment of Rule 11.05, although respondents are well aware that these rules contain no prior restraint since they do not require any written material to be submitted for prior review, approval or censorship. No prior screening and suppression of any literature is permitted under these rules. These rules allow only subsequent restraint or punishment, which

means, as respondents fully realize, that students may be subjected to disciplinary measures after they violate one of the rules, i.e., sell literature or force it upon others or distribute it in certain places at certain times or in such a way as to litter or disrupt the school. These rules give no school official the power to either review the contents of any literature or prevent its publication. The difference between prior and subsequent restraints was fully discussed in the Appellate Brief so respondents cannot in good faith profess ignorance and argue that the present rules allow prior review and censorship. Respondents are also aware that the law of Indiana requires the Board to promulgate written rules which inform students what behavior is prohibited before any student may legally be punished. (Public Law 130)

Obscenity

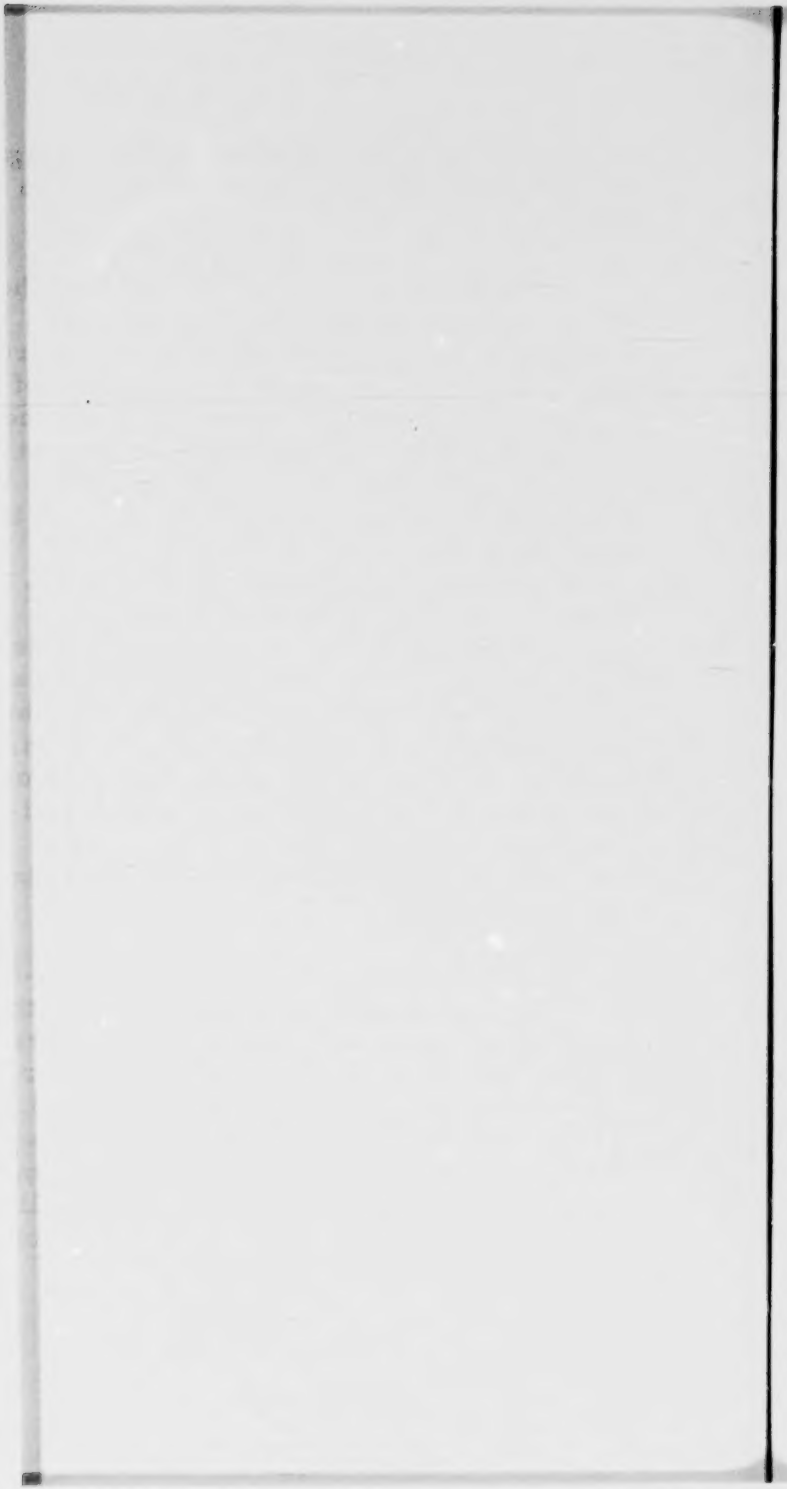
The validity of Board Rule 1.1.1.1 (which allows punishment of students for distribution of material which is obscene as to minors) is not an issue in this case as respondents imply.

Petitioners third question presented for review request two rulings of this court: (1) whether the written use or distribution of such words as "f---, screw, eat shit" by minor students in the special environment of the Indianapolis elementary and secondary schools is obscene as to minors and (2) whether students can be punished for the written use of such

language even if it is held to be filthy, vulgar and indecent, but not legally obscene as to minors.

Petitioners have never claimed that the filthy, obscene words and pictures found throughout the Corn Cob Curtain were more than a small percent of the total number of words and pictures. However, it is not the number of times an obscenity is written in a newspaper distributed in school to minors which should be the determining factor of its effect upon the minds of children and the accomplishment of educational objectives. "Fire" need only be shouted once in a crowded theater to cause complete disorder. If the word "f---" is printed ten times in a newspaper of 1,000 words which is distributed at school to a captive audience of children, many of whom are emotionally disturbed or mentally deficient, said newspaper is definitely going to cause erotic thoughts and disruption of the proper work and discipline of the schools.

Respondents also argue that any pre-1971 or Cohen cases which hold that school authorities may regulate such language by minors in schools should be disregarded. Petitioners submit that Cohen v. California, 403 U.S. 15 (1971), should be distinguished from the case at bar since Cohen involved a criminal conviction for wearing a jacket in the public hall of a court house, which was removed and not revealed in the court room.



Respondents have also failed to properly argue without misrepresentation the other questions presented. For example, the fifth question involved 17C, Federal Rules of Civil Procedure, but respondents' discussed only 17(a) of said rules. The cases cited by respondents are also irrelevant since the issue of the appointment of a guardian was not even raised or mentioned in any of them.

Conclusion

Wherefore, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TERM 1978

NO. 78-1547

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
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vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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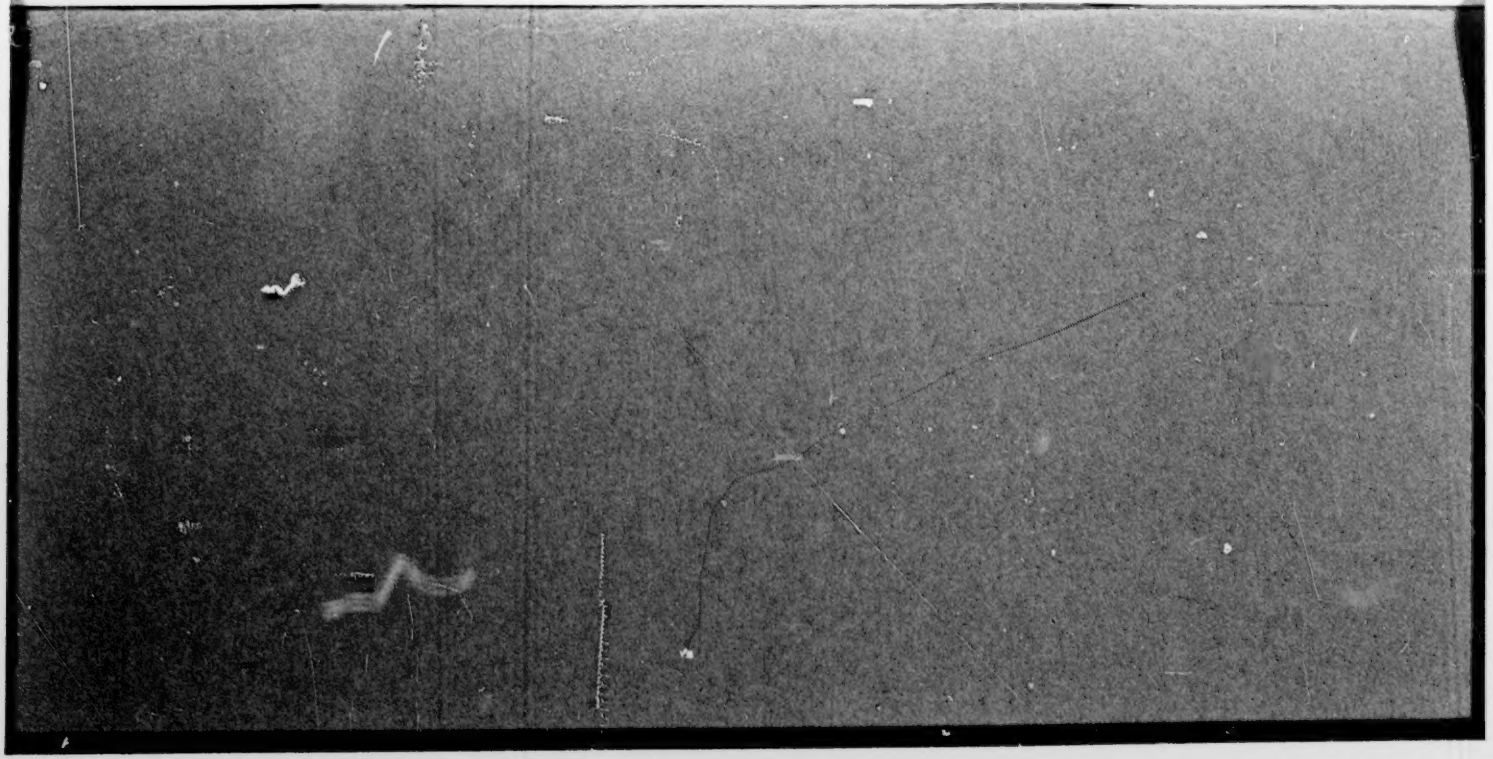

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IN THE

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TERM 1973

NO. 73-1347

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Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, filed December 14, 1973, 490 F.2d 601, is reprinted at App. Pet. Cert. 16-31. The October 19, 1972, opinion of the United States District Court for the Southern District of Indiana, 349 F.Supp. 605, is reprinted at App. Pet. Cert. 5-15. The Findings of Fact and Conclusions of Law of the District Court is reprinted at App. Pet. Cert. 1-4.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1973. The petition for writ of certiorari was

filed on March 5, 1974, and was granted June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 17(c) of the Federal Rules of Civil Procedure provides:

> "Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

The first amendment of Board Rule 11.05 (Prior Review with Safeguards) is reprinted at App. 17-20. The second

amendment of the Board Rules (Subsequent Review) is reprinted at App. 22-26.

QUESTIONS PRESENTED FOR REVIEW

1. In a court's consideration of the extent of constitutional (First and Fourteenth Amendments) restrictions upon the power of a school board to adopt rules governing student conduct in elementary and secondary schools:

a. Do the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes also apply to rules adopted by a school board which subject students to disciplinary measures for certain activities in school?

b. May conduct or language of minor students, not regulated in the community at-large, be constitutionally regulated within elementary and secondary schools?

c. Is it constitutionally permissible for school authorities to impose greater restrictions on minors than the state could constitutionally impose on adults without violating the First Amendment?

2. Does the United States Constitution (First and Fourteenth Amendments) prohibit a school board from adopting rules concerning the distribution of literature by students in its elementary and secondary schools which subject students to disciplinary measures for the following activities?

a. Solicitation of funds or sales of literature and/or other products to students within elementary and secondary schools;

b. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

c. Student distribution of anonymous literature or literature which is not written by a student or school employee; and

d. Distribution of literature by students in schools while classes are being conducted in the school in which the distribution is to be made.

3. Are words found throughout a student newspaper, such as "f - - -, eat shit," awarding points for the number of "freak girls screwed," and a cartoon picturing the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," obscene as to minors and can school authorities punish students for the use of such language in elementary and secondary schools, even if such language is held to be filthy, vulgar and indecent, but not legally obscene as to minors?

4. Does the United States Constitution prevent a school board from adopting reasonable rules which would require prior approval by school authorities of literature before its distribution in elementary and secondary schools?

5. Did the Court err in holding that Rule 17(c) of the Federal Rules of Civil Procedure requiring the appointment of an appropriate representative for infants in litigation did not apply where a constitutional question was presented?

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C., Section 1983, and 28 U.S.C., Sections 1343, 2201 and 2202.

On June 1, 1972, Plaintiffs, high school students in the Indianapolis Public Schools, filed a class action for declaratory and injunctive relief, and for compensatory and punitive damages in the United States District Court for the Southern District of Indiana, the Honorable William E. Steckler, presiding trial judge. The Defendants in said cause were the Board of School Commissioners of the City

of Indianapolis, Indiana, and its individual members (hereinafter referred to as the Board) and the Superintendent and Administrative Assistant of the Indianapolis Public Schools. Plaintiff students sought an injunction against said Defendants, enjoining them from prohibiting distribution of the *Corn Cob Curtain*, an unofficial student newspaper, in the Indianapolis Public Schools. The students also sought a declaratory judgment that Board Rules 11.05 and 11.06 violated their constitutional rights (First and Fourteenth Amendments). These Rules, which required the Superintendent's prior approval before sales or solicitations or the distribution of literature would be permitted in the schools, were declared unconstitutional by the District Court after an evidentiary hearing on August 24-25, 1972. The Court on August 24, 1972, also denied Defendants' petition for appointment of guardian ad litem or next friend for Plaintiffs and all members of the class they purport to represent.

In September, 1972, pursuant to the Court's order (App. 1-2) the Board amended its original Rules (reprinted App. 17-20). Although amended Rule 11.05 still required prior review of student literature, procedural and substantive safeguards and guidelines were added as were suggested by the Second Circuit in *Eisner v. Stamford Board of Education* (2d Cir., 1971), 440 F.2d 803. However, due to the Court's belief that any requirement of prior approval of student literature was unconstitutional and its order of September 29, 1972, directing the Board to submit additional and/or supplemental guidelines regarding the sale and distribution of student publications (App. 2), the Board again amended Rule 11.05 to remove the requirement of prior review of student literature. The complete text of this final amendment is found in App. 22-26.

On October 19, 1972, the Court entered a permanent injunction against the Defendants, setting out certain conditions for Board rules and declared amended Rule 11.06

and five sections of amended Rule 11.05 unconstitutional. On November 9, 1972, Defendants filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from the judgment and order of October 19, 1972. The Board requested that the Court of Appeals hold that the first amendment of Rule 11.05 (prior approval with safeguards) and the second amendment of Rule 11.05 and Rule 11.06 (subsequent restraints) were constitutionally permissible and that the Court find the foul language in the *Corn Cob Curtain* obscene as to minors or that minor students could be disciplined for the use of such language in school even if it was not legally obscene as to minors.

In addition, the Court of Appeals was requested to reverse the District Court's decision due to its failure to follow Rule 17(c) of the Federal Rules of Civil Procedure, and to vacate part of the injunction for overbreadth and declare it invalid to the extent that it prohibits review of student literature prior to its distribution in school. Although the Court of Appeals failed to mention these last two issues, it affirmed the District Court's judgment and injunction in all respects, Judge Christensen dissenting in part.

On March 5, 1974, the Board filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and on June 3, 1974, this Court granted the writ.

After the distribution both on and off school property of a few issues (and some 200 copies) of the *Corn Cob Curtain* (hereafter sometimes referred to as *CCC*), the students were informed that they could not sell the *CCC* in the Indianapolis schools because of its obscene, defamatory, abusive, filthy and indecent content, and its disruptive effect on the learning process. School officials objected to the use of language such as "eat shit," and "f - - -," an obscene cartoon depicting the principal sitting on a toilet

in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," and false charges of racial discrimination against a coach. (App. 53-63)

The testimony of the Superintendent and affidavits from all principals in Indianapolis high schools and over 200 parents in the school community were offered and admitted to prove that the *CCC* appealed to the prurient, shameful or morbid interest of minors, was patently offensive to prevailing standards in the community with respect to what is suitable material for minors and utterly without redeeming social importance for minors. (App. 63-64) There were no counter affidavits. Plaintiffs testified that none of them had written any of the material objected to; that it was written by anonymous persons and sent to a post office box. (App. 32, 40) The students also admitted that the use of such four-letter words was improper, upsetting, and embarrassing but that they would be printed in the *CCC* as is, with absolutely no editing. (App. 32, 33, 38, 42) Furthermore, it was the policy of the *CCC* never to edit material received, even from unknown sources and to protect the names of its authors. (App. 28, 38)

There was also evidence that the Superintendent stopped the distribution of the *CCC* because he had reasonable cause to believe that its distribution would seriously disrupt the learning process and cause a rather considerable disturbance. (App. 44-47) Dr. Kalp also testified that especially in view of the unrest and unstable situation at Tech High School and some of the other schools, it does not take something very serious or significant to set the children off in disruptions and confrontations (App. 44-45); that the cartoon depicting a student putting a bomb in the toilet to blow up the school and principal might incite some child to use it to support their own actions and misconduct. (App. 47)

The Superintendent pointed out that other materials such as a Ku Klux Klan publication (Defendants' Exhibit D) were not given approval because they would cause disruptions by students. (App. 44) The decision not to permit the *CCC* to be distributed had to take into consideration that unrest and disturbances had occurred with alarming frequency at various high schools. (App. 12-13, 44) Dr. Kalp's apprehension and forecast of disruption was also due to the fact that the *CCC* is completely unedited; receives and prints anonymous articles from unknown sources and the presence of emotionally disturbed children in the Indianapolis schools. (App. 45-46) It was also the policy of the *CCC* to protect the names of its authors. (Complaint, Exhibit A, p. 2)

Dr. Kalp further testified that salesmen frequently request permission to go into the schools to sell items to the faculty and students and that this is a problem. He said it was absolutely necessary for the continuing function of the schools to limit sales and solicitations in the schools. (App. 43)

The affidavit of Dr. Kalp which was never contradicted states the justification for prohibiting the defamatory, obscene, indecent language and cartoons found throughout the *CCC*. This affidavit presents a fine summary of some of the basic reasons for the Board Rules in question and is reprinted at App. 11-16.

SUMMARY OF ARGUMENT

Question One

We are concerned in this case with the constitutional limitations on the power and discretion of a school board to regulate student conduct and press in elementary and secondary schools which would impede, obstruct or threaten the proper functioning of the school and the achievement of valid educational goals.

Because freedom of speech is one of our most fundamental rights and since criminal punishment is one of government's most awesome and dangerous powers, the power of government to take away a person's liberty and property for his speech and conduct should be carefully restricted within easily identifiable boundaries. Thus we find few limits placed on expression in the community-at-large. However, the lower courts' "insistence on equating, for constitutional purposes, the authority of the state to criminally punish with its authority to exercise even a modicum of control over the [elementary and secondary schools] which it operates, serves neither the Constitution nor public education well." (35 L.Ed.2d 626) Elementary and secondary schools, their purpose, environment and operation differ fundamentally with that of the community at-large, and Board rules are not criminal statutes and do not impose any criminal sanctions whatsoever.

The Court of Appeals for the Seventh Circuit is probably the only court which assumes that the identical constitutional standards for vagueness and overbreadth which are applicable to criminal statutes must also apply to rules adopted by a school board to regulate student behavior. Every rule it examined was declared void on its face for overbreadth. The Court's facial approach, if sustained by this Court, will have a disastrous effect upon the administration of public schools in this country. If any student is disciplined for flagrant violation of a Board rule or wishes to challenge a Board rule, then under the Court's method of review of the regulation, if the student or Court could suggest hypothetical impermissible applications of the rule, it would be declared void on its face and the student could escape any punishment even if his own conduct was not privileged or protected. By this method of review, a judiciary which lacks expertise and training in the problems of operating public schools may abolish virtually any Board rule it deems unwise and thus preclude the exercise

of prudent judgment by those knowledgeable and experienced in public school administration.

It is submitted that there is little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity in Board regulations, particularly in view of the fact that school authorities impose no criminal penalties and have inherent power to maintain order and discipline students in school. Since children can be lawfully disciplined for varieties of misbehavior so numerous as to defy listing, conduct codes are preferably expressed in general terms.

It seems reasonable that the constitutional limits on student expression in the schoolhouse may be different from those in the community at-large, because there are different elements in balancing the private and public interests involved. The grade or high school environment is unique due to its physically confining nature, the immaturity of its inhabitants, their compulsory attendance and the special demands and needs of the educational purpose. A schoolhouse is not public in the same sense as streets and parks. It also cannot be compared to a university which is more like a town and is comprised of adults who are presumably there by choice.

This Court in *Tinker* recognized that students' First Amendment rights should be applied in light of the special characteristics of the school environment. The circumstances of the place and purpose of the regulation, the fact that the students are minors who constitutionally may be subjected to greater restrictions than adults, and the fact that no criminal sanctions are to be imposed are all crucial factors to be considered by this Court in determining whether the Board rules in question should be upheld as reasonable and necessary to achieve vital educational goals.

Thus the Court erred in basing its decision on three erroneous assumptions. It erroneously assumed that Board

regulations should be tested by the same strict standards and tests for overbreadth and vagueness which are applicable to criminal statutes. Second, it erroneously assumed that if the conduct or language of minor students could not be regulated in the general community, it could not constitutionally be regulated in an elementary or secondary school. Third, it erroneously assumed that the power of school authorities to control the press related activities of minors does not reach beyond the scope of state authority over adults.

Question Two

This question concerns the constitutional validity of six Board Rules regulating the distribution of literature by students in elementary and secondary schools which the Court held facially unconstitutional for overbreadth and/or vagueness. These Rules permit no predistribution review or censorship of student literature but subject students to disciplinary measures ranging from a reprimand to a limited expulsion (as a last resort) for certain activities in school.

These Board regulations prohibit the following activities by students with the Indianapolis public schools (both elementary and secondary schools):

A. Solicitation of funds or sales of literature and/or other products (2 rules);

B. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

C. Student distribution of anonymous literature or literature which is not written by students or school employees (2 rules);

D. Distribution of literature in school while classes are being conducted.

The Supreme Court recently set out a four-pronged test for determining if a criminal statute was overbroad. *United States v. O'Brien* (1968), 391 U.S. 367. A criminal statute is not overbroad and is constitutionally justified if

(1) "it is within the constitutional power of government;

(2) it furthers an important or substantial governmental interest;

(3) the governmental interest is unrelated to the suppression of free expression; and

(4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. at 377)

It is submitted that these elements, particularly 3 and 4 need not be as strictly applied to a school board regulation due to the fundamental differences between the school society and general society and the fact that the Board regulations govern conduct of minors and impose no criminal penalties. Nevertheless it is clear that the six Board Rules meet these four requirements.

(1) They are all within the constitutional power of the School Board. A long line of decisions uphold the power of a school board to prohibit the use of school property for non-school purposes since "the state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida* (1966), 385 U.S. 39, 47. Thus the Board should not be *required* to permit its schools to be used for non-school purposes such as sales and solicitations or distribution of non-school literature written by outsiders who seek to use the school as their platform.

The Board not only has constitutional power to regulate the use of property under its control but also has an inherent power to control student conduct in its schools. It has the right and duty not only to protect students in its

charge but to provide an academic atmosphere so that students may learn. It has the power to regulate and prohibit any behavior which materially impedes or obstructs the accomplishment of its educational mission.

(2) All the Rules in question also further important governmental interests. This Court reaffirmed in *Tinker, infra,* 393 U.S. at 507 that an important governmental interest lies in the implementation of "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." The Board also has a vital interest in maintaining order and discipline in its schools and an academic atmosphere free of distractive influences so that educational objectives may be achieved. Schools also have an interest in protecting the safety and well-being of its students and in identifying students who abuse their freedoms and harm others through the use of fraud, libel and obscenity.

This test basically means that there must be a valid reason for the rule and that it must be reasonably connected to the proper operation of the school. There are many valid substantial reasons for the six Board Rules and they unquestionably further and protect important interests of the Board.

(3) All of these governmental interests are unrelated to the suppression of free expression. None of the Rules place any restrictions upon what students can say or write. They permit absolutely no censorship of the content of student expression. The Rules simply place reasonable regulations on the time, place and manner of distribution, all of which are necessary for the proper operation of the schools.

(4) The incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of the governmental interests. To prohibit

students from turning the schoolhouse into a literal marketplace; to prohibit them from delaying or disrupting classwork by forbidding distribution while classes are in session which all are required to attend; to prohibit significant disruptions; to prohibit students from becoming the tools of outsiders who seek to reach a vulnerable captive audience in school; to prohibit anonymity so that those responsible for abuses may be identified; all of these prohibitions are essential to further substantial governmental interests. Because students and teachers cannot easily disassociate themselves from expressions directed towards them on school property, because of the pressures upon children of multiple sales and solicitations, because students are so easily distracted from their tasks and must learn self-restraint, because disciplinary problems in such a populated and physically confining setting seriously sap the educational process and because teachers and administrators have the vital responsibility of compressing a variety of subjects and activities in a relatively confined period of time and space, these Rules are necessary so that vital educational objectives may be achieved. Any incidental restrictions on the exercise of speech or press are no greater than necessary to achieve valid goals, and while they may not be permissible restrictions on adults in the general community, they are constitutionally permissible in grade and high schools.

The four requirements of this test having been met, the Court erred in holding the Board Rules unconstitutional for overbreadth.

Similar Board Rules have been examined and upheld by other Courts. In fact these Rules simply implement what has undoubtedly been the practice of most schools throughout the country. Petitioners know of no other Court which has held similar board rules facially overbroad or too vague.

Every case cited by the lower courts as support are easily distinguishable from the case at bar and do not justify invalidation of these Rules.

It is rather ironic that a Court so concerned with overbreadth by the Board could have failed to comment on the overbreadth of the injunction against the Board. The Board was permanently enjoined from adopting or enforcing any rule which "would subject any covered student to the threat of discipline because of the reaction or response of any other person to written material. . . ." (Pet. App. 14) Yet the principles announced by this Court in *Tinker* clearly would allow school authorities to discipline students who distribute materials which cause reactions such as fights and riots or other disruptions interfering with school work or discipline. This injunction also conflicts with the unassailable power of the State to suppress "fighting words" or words which "have all the effect of force" recognized by the Supreme Court in many cases. Thus it should be vacated.

Question Three

This question is concerned with the extent of the constitutional power of elementary and secondary school officials to prohibit the use and distribution in school of filthy, obscene language contained in the *Corn Cob Curtain* such as "f - - -," "eat shit" and vile cartoons such as are reprinted at App. 56-63. The distribution in school of the *Corn Cob Curtain* was prohibited because it contained obscene, filthy, indecent and defamatory language and cartoons which school officials believed were harmful to minors, and would impede and obstruct substantial educational goals.

The District Court refused to rule on the Board's claim that material contained in the *Corn Cob Curtain* was obscene as to minors, but the Court of Appeals, with one dissent, held that it was not, despite the fact that all the

evidence indicated that it was obscene as to minors under the *Ginsberg-Memoirs* tests.

Although the Supreme Court has stated that the concept of obscenity may vary according to the group to whom the questionable material is directed or from whom it is quarantined and has indicated that material which is not obscene for adults may be obscene as to minors, it has never specifically defined the concept of obscenity to minors.

Surely a definition following the *Miller v. California* standard should be acceptable to this Court. However, the case at bar is not a criminal case and no child is going to be jailed or fined for distributing obscene literature at school. Since one of the basic functions of our schools is to teach children self-discipline and to express themselves properly in acceptable, civil terms, school officials should not be required to prove that filthy language meets all the elements of a criminal test for obscenity in order to discipline students who flaunt rules of basic common sense and decency by using or distributing such gutter language in the schoolhouse.

The Brief discusses ten basic reasons for allowing the Board to prohibit the use and distribution of such filth among minors in its schools, regardless of its label. Parents who have no choice but to send their children to school demand it, expect it and have a right to it. Not only will parents lose respect for a school which permits their children to be exposed to such filth, but children would lose respect for a school which tells children that such language is improper but allows them to freely distribute it in school. Children are harmed by such inconsistencies and are also harmed by being exposed to such language in school.

Such language is inherently distractive and disruptive and is scarcely conducive to maintaining an academic atmosphere and a level of decency necessary for learning

to take place. No person can seriously contend that such language has any proper place in the schoolhouse or that permitting its use in elementary or secondary schools would not materially impair the accomplishment of educational objectives. There is probably not one primary or secondary school in the country that condones or permits children to use such language at school. What possible benefit, value or good could be derived by announcing that millions of minors are now free to fill the schools with obscenities?

Are the Courts to be the only places left where indecent language may be prohibited? Surely the Board has more substantial reasons for prohibiting indecent language in its elementary and secondary schools than this Court has in prohibiting indecency in its courtroom or in briefs.

Question Four

The Board amended its original Rule of prior review by adding procedural and substantive guidelines suggested by other Courts of Appeal. (App. 17-20) Because the District Court told the Board that it would hold the amended Rule unconstitutional and because the Seventh Circuit disapproved of any rule requiring prior approval of student literature even if it provided procedural and substantive safeguards, the Board submitted additional Rules which allowed only subsequent restraints.

The lower courts' assumption that a school board may not require any prior approval of student literature before its distribution in elementary and secondary schools is erroneous and flies in the face of decisions by other Circuits as well as this Court.

There is no logical reason to prevent school authorities from "taking a peek" at student literature prior to its distribution in the schoolhouse. Prior review may even be preferable to subsequent restraints for several reasons. The Board is entitled to take preventive measures to protect the school and its inhabitants from major disruptions,

obscenity and libel. It should not be required to wait until the harm occurs. In addition a requirement of predistribution approval would obviate the necessity for any subsequent restraints which the Court of Appeals finds so onerous.

The Board's amended Rule of prior review provides adequate procedural and substantive safeguards and should be upheld by this Court.

Question Five

Since the Plaintiffs were minors, Rule 17(c) of the Federal Rules of Civil Procedure required the District Court to either appoint a guardian ad litem for them or make such other order as was proper for their protection. The Court chose to do neither, although it was presented with a petition to appoint a guardian ad litem prior to trial. Instead the District Court announced a revolutionary new principle of law—that where a constitutional question as distinguished from money damages is involved, the mandatory requirements of Rule 17(c) do not apply. (App. 26-28) It ignored the fact that the minors were requesting compensatory and punitive damages.

This decision not only reveals the Court's refusal to differentiate between minors and adults even when the Federal Rules so require, but is significant because of the distinct possibility that infant plaintiffs could have reversed the decision had they lost.

The possibility became a reality in *Roberts v. Ohio Casualty Insurance Co.*, (5th Cir., 1958), 256 F.2d 35, which reversed a judgment against some minor children although no one even gave a thought to an appointment of a guardian ad litem until after the judgment was rendered.

The refusal to follow Rule 17(c) is even more remarkable in view of the fact that the Plaintiffs were purporting to represent (in a "class action"), nearly 100,000 other students who were also infants.

ARGUMENT

QUESTION ONE

In a court's consideration of the extent of constitutional (First and Fourteenth Amendments) restrictions upon the power of a school board to adopt rules governing student conduct in elementary and secondary schools:

A. DO THE IDENTICAL CONSTITUTIONAL STANDARDS AND TESTS FOR VAGUENESS AND OVERBREADTH WHICH ARE APPLICABLE TO CRIMINAL STATUTES ALSO APPLY TO RULES ADOPTED BY A SCHOOL BOARD WHICH SUBJECT STUDENTS TO DISCIPLINARY MEASURES FOR CERTAIN ACTIVITIES IN SCHOOLS?

Every board rule examined by the Court of Appeals was held facially unconstitutional either for overbreadth and/or vagueness. It is clear that the Court held the School Board to the same strict constitutional standards for overbreadth and vagueness applicable to a legislature, since virtually every case cited by the Court involved a statute, particularly *criminal* statutes.[1]

Yet the Seventh Circuit is probably the only Circuit which assumes that school board regulations and policies governing student conduct in school must be equated to criminal statutes. Other courts which have considered this question agree that the rules or codes of conduct prescribed for students by educational institutions are *not* required to satisfy the same rigorous standards for vagueness and overbreadth as are criminal statutes. See, *e.g.*,

[1] The only exceptions were two of its own cases: *Scoville v. Board of Education of Joliet Twp. H.S. District 204* (7th Cir., 1970), 425 F.2d 10; *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355; and two cases decided by this Court: *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503; *Papish v. Board of Curators of University of Missouri* (1973), 410 U.S. 667, 35 L.Ed.2d 618.

Sill v. Pennsylvania State University (3rd Cir., 1972), 462 F.2d 463; *Jones v. Snead* (8th Cir., 1970), 431 F.2d 1115; *Sword v. Fox* (4th Cir., 1971), 446 F.2d 1091; *Press v. Pasadena Independent School District* (S.D. Tex., 1971), 326 F.Supp. 550; *Speake v. Graham* (Miss. 1970), 317 F. Supp. 1233, *aff.* 440 F.2d 1351.

Some Circuits have gone a step further and held that the tests for vagueness and overbreadth that apply to ordinary *statutes* should not apply to school regulations. For example, in *Jones v. State Board of Education* (M.D. Tenn., 1968), 279 F.Supp. 190, *aff'd.* (6th Cir.), 407 F.2d 834, *cert. dism'd. as improvidently granted,* 397 U.S. 31, *reh. den.* 397 U.S. 1018, the Court rejected the contentions of university students that regulations under which they were expelled (for distributing literature advocating a student boycott) were unconstitutionally vague. These regulations prohibited "(1) Disrespect for university authority, (2) Any act in violation of city, county, state or federal law; and (3) Any other infractions of standards of conduct that require severe disciplinary actions." (279 F.Supp. at 201) The Court noted that the students were not attacking a state *statute,* but a student *regulation* found in a university handbook and said "University regulations for students because of the very nature of the institution and its goals and purposes, should not be tested by the same requirements of specificity as are state statutes." (279 F.Supp. at 202)

The Eighth Circuit agreed in *Esteban v. Central Missouri State College* (8th Cir., 1969), 415 F.2d 1077, cert. den. (1970), 398 U.S. 965 saying:

> ". . . we see little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not

> as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms." (415 F.2d at 1088)

Perhaps the most comprehensive statement on this issue was made in *General Order of Judicial Standards of Procedure and Substance in Review of Student Discipline* (W.D. Mo., 1968), 45 F.R.D. 133, 146, which has been cited with approval by many courts.

The basic reason given by courts for refusing to apply criminal standards and processes to school conduct rules is that criminal law is designed for circumstances and ends unrelated to the academic community. In addition, school authorities have inherent power to maintain order and to discipline students. If courts imposed upon educational institutions the intricate, time-consuming, sophisticated rules, standards, procedures, or safeguards of criminal law, it would frustrate the teaching process and render institutional disciplinary control impotent. *Esteban v. Central Missouri State College* (W.D. Mo., 1968), 290 F. Supp. 622, 629. Furthermore, the reasons for which students may be lawfully disciplined or suspended from school are limited only by the varieties of misbehavior which their ingenuity can devise. They are so numerous as to defy listing and therefore necessitate the use of encompassing words in conduct codes.

A close examination of cases recently decided by this Court provides support for the view that no analogy should be made between criminal statutes and board regulations. In *Healy v. James* (1972), 408 U.S. 169, 33 L.Ed.2d 266, Justice Rehnquist in a concurring opinion noted that:

> "I find the implication clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. The Court's quotations from Tinker * * * and from Esteban v. Central Missouri State College, 415 F.2d

> 1077, 1089 (CA 8 1969), to the effect that a college 'may expect that its students adhere to generally accepted standards of conduct,' emphasize this fact. * * * Because of these acknowledged distinctions of constitutional dimension based upon the role of the government, I have serious doubt as to whether cases dealing with the imposition of criminal sanctions * * * are properly applicable to this case dealing with the government as college administrator. * * * And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each." (408 U.S. at 202-203)

This Court held in *Parker v. Levy*, No. 73-206, June 19, 1974, that the same strict standards for vagueness and overbreadth do not apply to military codes of conduct. While we do not mean to imply that the environment and purpose of the Indianapolis schools should be equated to that of the military, a valid analogy can be made and many of the principles stated in *Parker* can be applied with equal validity to elementary and secondary schools for the same reason—the basic factors differentiating the school society from the community at-large. Proper education, like the military mission, is vital and basic to civilized society and therefore elementary and secondary schools must have wide discretion and broad powers to prescribe and control conduct of children at school.

Unlike the military code in *Parker v. Levy, supra*, which provides penalties of death and substantial penal confinemen., the Board Rules permit only mild disciplinary measures ranging from reprimand or counselling after school to the maximum of expulsion. Expulsion is used only as a last resort and the student is provided *many* protections under an Indiana statute. (Public Law 162, *Burns' Indiana Stat. Anno.*, Sec. 28-5358, *et seq.*) For example, if a student requests an expulsion hearing, he may not be expelled

until he receives a prompt, adversary hearing before a hearing officer not connected to the school; the superintendent must concur in the hearing officer's decision, and the student has the right to prompt review of the decision by the School Board and courts. The maximum length of an expulsion is limited also; for example, a student over 16 may be expelled at maximum for the remainder of the school year. Thus, there is no valid comparison between criminal statutes and the Board Rules. Under the Board Rules, a student may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. Nevertheless, the student is by statute accorded many of the same procedural safeguards as one accused of a crime.

B. MAY CONDUCT OR LANGUAGE OF MINOR STUDENTS, NOT REGULATED IN THE COMMUNITY AT-LARGE, BE CONSTITUTIONALLY REGULATED WITHIN ELEMENTARY AND SECONDARY SCHOOLS?

This question is closely related to Part A and to the general issue of overbreadth. It is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts. See, *e.g., Shanley v. Northeast Independent School District* (5th Cir., 1972), 462 F.2d 960, 974. For example, a march down the middle of a street might be protected activity, while a march down the hallway of a building might not.

The contrast between the setting and operation of a grade or high school and the community at-large is well known to everyone, but the significance of these differences cannot be over emphasized. In a high school hundreds or thousands of youngsters of widely differing backgrounds and abilities are brought together for seven hours a day in one building for the purpose of developing their intellectual or vocational capacities, which effort is distasteful to

many and resisted by some. The schoolhouse is not public in the same sense as streets, courthouses and public parks, and students may not use the schools at their whim as a platform for the exercise of free speech. These differences and the unique and special purpose of elementary and secondary schools require a different application of constitutional principles applicable to the general community so that school authorities are permitted to regulate both with greater breadth and with greater flexibility than legislators when prescribing the rules by which minor students shall be governed at school.

This Court, in *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503, 21 L.Ed.2d 731, implicitly recognized the difference when it said that students' First Amendment rights should be applied in light of the special characteristics of the school environment. (393 U.S. at 506)

In *Parker v. Levy, supra,* this Court stated:

> "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." (page 23)

The Board submits that there is also a fundamental difference between the school and the community at-large. Because of factors such as the special need for maintaining order and discipline at schools so that vital educational objectives may be achieved, and the immaturity of the schools' inhabitants, certain restrictions are and must be placed upon the freedom and conduct of students, which might well be intolerable in the university community or

the community at-large. Justice Rehnquist, concurring in *Healy v. James, supra,* stated:

> "The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens." (408 U.S. at 203)

Keeping these principles in mind, the Board Rules discussed below should be upheld as reasonable Rules which are essential to the proper function of the Indianapolis schools.

C. IS IT CONSTITUTIONALLY PERMISSIBLE FOR SCHOOL AUTHORITIES TO IMPOSE GREATER RESTRICTIONS ON MINORS THAN THE STATE COULD CONSTITUTIONALLY IMPOSE ON ADULTS WITHOUT VIOLATING THE FIRST AMENDMENT?

Most courts, in considering the permissible limits of control over the speech of high school students recognize that "they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults." *Baker v. Downey City Board of Education* (C.D. Cal., 1969), 307 F.Supp. 517, 527.

In *Crossen v. Fatsi* (D.Conn., 1970), 309 F.Supp. 114, the Court said:

> "Any attempt to compare and equate the constitutional rights of adults . . . on the same plane with that of the adolescent high school teenagers, . . . is like comparing oranges and apples. The compulsory nature of . . . education at the high school level involves added disciplines essential to maintain the purpose and fabric of that relationship, free of disruption, so that educational objectives are most likely to be obtained."

In *Ginsberg v. New York* (1968), 390 U.S. 629, 638, this view was also reaffirmed by this Court which noted:

> ". . . we have recognized that even where there is an invasion of protected liberty 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .' Prince v. Massachusetts, 321 U.S. 158, 170."

It does not require a vivid imagination to visualize the type of atmosphere and discipline that would prevail in primary and secondary schools if children at school were permitted with impunity to mock and ridicule their teachers and one another, use filthy, profane or obscene language, urge others to disobey their teachers, school rules, or the law, conduct commercial activities, and anonymously write falsehoods, thereby causing a delay of school work, distractions, disruptions, or violence. School authorities throughout the nation have always endeavored to discourage this improper behavior. In fact, the elementary or secondary school is viewed by most as a substitute parent and has the duty to protect minors, set proper examples, and instruct students in the principles of morality, truth and justice.

If the Board Rules are held unconstitutional by this Court, the elementary and secondary schools will not be able to maintain even a basic level of decency, order and discipline necessary to obtain the academic atmosphere essential for learning. Furthermore, since one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of values shared by members of the community—some measure of public regulation of classroom speech is inherent in the very provision of public education.

Thus, the age of the students must be a crucial factor in determining the validity of the Rules in question, particularly since conduct which might go unnoticed and be of little or no influence with college students or adults, may

have a profound effect on discipline and learning in elementary and secondary schools.

To conclude the first question, a paraphrase of *Parker v. Levy, supra,* seems appropriate. Just as the elementary and secondary school students are separated in an atmosphere dramatically different from general society, or even the university society, so school rules exist separate and apart from statutes applicable to society in general. To maintain discipline in an academic atmosphere essential to perform its mission effectively, elementary and secondary schools have developed basic policies and practices which are essential to its vital goals. The schools have always regulated certain conduct and speech of its minor students which are left unregulated in the general community. In elementary and secondary schools, some restrictions exist and are necessary for reasons that have no counterpart in the general community. Vulgar and indecent language, or disrespectful and contemptuous speech, even advocacy of violent change is tolerable in the general community or perhaps even in the university community, for it does not directly affect the capacity of the government to discharge its responsibility unless it both is directed to inciting imminent lawless action and is likely to produce such action. In the elementary and secondary schools, however, other considerations must be weighed. Because the proper operation of the public school system is one of the highest and most fundamental responsibilities of the state, because elementary and secondary schools are filled with vulnerable immature children who are required to attend school to learn, because discipline and an academic atmosphere is essential for learning to take place, because so many children do not have the mental or emotional maturity to control themselves or to conceptualize and make valid judgments, a different application of First Amendment protections is required in elementary and secondary schools. Although these principles were obvi-

ously rejected by the Court of Appeals, they are nevertheless valid principles which should be applied to uphold the Rules in question.

QUESTION TWO

Does the United States Constitution (First and Fourteenth Amendments) prohibit a school board from adopting rules concerning the distribution of literature by students in elementary and secondary schools which subject students to disciplinary measures for the following activities?

A. Solicitation of funds or sales of literature and/or other products to students within elementary and secondary schools;

B. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

C. Student distribution of anonymous literature or literature which is not written by students or school employees;

D. Distribution of literature by students in school while classes are being conducted in the school in which the distribution is to be made.

This question concerns the validity of the present Board rules (second amendment allowing only subsequent restraints) which the Court of Appeals found unconstitutional for vagueness and/or overbreadth.

A. SALES AND SOLICITATIONS

The present *amended* Board rules on sales and solicitations in the Indianapolis public schools read as follows:

> *Rule 11.06.* "No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, or organizations of parents and teachers or students

whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus."

Rule 11.05, Section 1.3.1.5. No distributable literature shall be distributed by any student in any school "in immediate exchange for money or any other thing of value (or for an immediate promise of money or any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable lietrature."

The *original* Rule 11.06 required prior approval of the Superintendent for any sales, collections of money or articles, contests or exhibits in the Indianapolis public schools. Because the District Court believed prior restraints on such activities were constitutionally impermissible and ordered the Board to submit new guidelines (8/29/72), the Board amended the Rule to remove the requirement of prior approval and to prohibit sales and solicitations at school except those for the use of the school. The Board was also aware that if it allowed one person or organization to sell products or solicit funds in the schools, it would be difficult to prohibit others from exercising the same privilege without being charged with discrimination. *Katz* v. *McAulay* (2d Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933.

These amended Rules were then held facially unconstitutional for overbreadth. The Board submits that the amended Rules quoted above are valid and not overbroad for the following reasons:

1. BOARD MAY PROHIBIT USE OF SCHOOL PROPERTY FOR NON-SCHOOL PURPOSES.

"The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida* (1966), 385 U.S. 39, 47; 17 L.Ed.2d 149, 159. Since public schools are dedicated to the specialized function of education, they may be utilized solely for that purpose. *Stacy v. Williams* (N.D. Miss., 1969), 306 F.Supp. 963, 969. A school board is clearly under no constitutional duty to allow schools to be used for non-school purposes—particularly commercial activities. In fact, courts formerly held that school property could not be used for *any purpose* not directly related to the instruction of pupils enrolled in school. See, *e.g., Bender v. Streabich* (1897), 182 Pa. 251, 37 A. 853. Later, some courts held that the use of school property for non-school purposes while classes were not in session rested within the sound *discretion* of school authorities. The Court, in *Merryman v. School District No. 16* (1931), 43 Wyo. 376, 5 P.2d 267, held that the school authorities did not exceed their authority or abuse their discretion by permitting school premises to be used while classes were not in session for certain activities, such as school plays, athletic events, dancing and the serving of luncheons.

The general provision of a statute empowering school boards to "adopt such measures as shall promote the good order and public usefulness" of the schools was held not to confer authority on a school board to allow school principals to *sell* school books and supplies to students on school premises at a profit, the Court stating that the statute did not disclose a legislative intent to confer power on school boards to permit school houses to be used for the conduct of private businesses for personal profit. *Tyre v. Krug* (1914), 159 Wis. 39, 149 N.W. 718, overruled on other grounds, 300 N.W. 225.

Thus, the Court of Appeals' decision that the School Board is now constitutionally required to permit its schools to be used for the sale of items for the personal profit of students and/or non-students denies the right of the Board to regulate the use of school property under its control in the face of a long line of decisions holding to the contrary.

2. RULE UPHELD IF REASONABLE BASIS FOR IT.

Courts in their examination of school board rules which regulate student conduct at school basically agree that school authorities should possess considerable leeway in promulgating regulations for the proper conduct of students, and that "courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools." *Graham v. Houston Independent School District* (S.D. Tex., 1970), 335 F.Supp. 1164, at 1167, *aff'd.* (5th Cir., 1970), 433 F.2d 355. See, *e.g., Wood v. Alamo Heights Independent School District* (W. D. Tex., 1970), 308 F.Supp. 551., *aff'd* 433 F.2d 355.

Burnside v. Byars (5th Cir., 1966), 363 F.2d 744, cited with approval by this Court in *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503, defined a reasonable regulation as "one which measurably contributes to the maintenance of order and decorum within the educational system." 363 F.2d at 748. Since the Rules in question measurably contribute to such order and decorum they should be upheld as reasonable regulations. If the reasons advanced for the regulation are substantial, it will be upheld even if it limits speech. *E.g., Blackwell v. Issaquena County Board of Education* (5th Cir., 1966), 363 F.2d 749.

3. REASONS FOR RULE; SIMILAR RULES UPHELD BY OTHER COURTS.

There are many substantial valid reasons for prohibiting individuals, both students and outsiders, from selling or seeking contributions for any items, including newspapers, on school property. Some of these reasons were mentioned in *Cloak v. Cody* (N.D.N.C., 1971), 326 F.Supp. 391, which held that students' First Amendment rights were not violated by a board regulation which provided that:

> "No individual or non-school sponsored group be permitted to either solicit the sale of any item or seek contributions for any item or cause at any of the schools within the Chapel Hill City School System."

The Court upheld this rule and denied damages and an injunction to a student who was suspended for selling a student newspaper at a junior high school for the following reasons:

(a) The school program did not require that newspapers be available for purchase at school.

(b) The school operation created no hardships that would be satisfied only by being able to purchase the newspaper, *i.e.*, as in the case of snack shops by reason of lengthy intervals between meals and the termination of the school day.

(c) No school tradition was involved.

(d) The parents of the students did not want this to be available.

(e) The Court also noted that if students cannot be prohibited from exercising a clear commercial activity, such as the sale of or seeking donations for a newspaper, then all other school children can sell any commodity they like. "Under these circumstances it is not difficult to imagine the chaos that would result." (326 F.Supp. 391, at 396)

The Court cited as support *Breard v. Alexandria* (1951), 341 U.S. 622, 95 L.Ed. 1233, in which this Court upheld a solicitor's conviction under a municipal ordinance which prohibited solicitors of magazine subscriptions from calling upon the occupants of private homes without having been requested or invited to do so, stating that this did not deny freedom of speech and press. Surely, school boards have as much right to regulate such activities at their schools.

The Second Circuit, in *Katz v. McAulay* (2d Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933, emphasized the fifth reason, the pressures upon students of multiple solicitations, to justify and uphold a Board of Regents' rule prohibiting all solicitations of funds from pupils in public schools. It said:

> "Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary school pupils, as a captive audience, to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer the school system. Whether it is done a few minutes before school opens or a few minutes after, its effect is not so limited in time and it is plainly harmful to the operation of the public schools. If there is no regulation against it, literally dozens of organizations and causes may importune pupils to solicit on their behalf; and it is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation." (438 F.2d at 1061)

The student plaintiffs in *Katz* were threatened with expulsion if they distributed on school premises leaflets containing a request for contributions from their fellow

students for the criminal defense of certain activists. Their free circulation of such leaflets violated the board rule against solicitations and a local board of education rule forbidding any outside organization to use the school for the dissemination or release of information by flyers without first obtaining written approval by the board. The Second Circuit held that these rules were reasonable regulations and had a rational relationship to the orderly operation of the school system.

4. CASES CITED BY LOWER COURTS DO NOT JUSTIFY INVALIDATION OF THESE RULES.

Both the District Court and the Seventh Circuit refused to acknowledge these valid reasons for a policy against sales and solicitations and the special circumstances of a school environment which justify such a policy. Both Courts also ignored the cases upholding similar rules and cited as support decisions which are essentially irrelevant and can be readily distinguished from the case at bar.

(a) *District Court cases.*

(1) *Sullivan.*

The main case which the District Court cited to support its ruling was *Sullivan v. Houston Independent School District* (S.D. Tex., 1971), 333 F.Supp. 1149. The issue in this case was whether the board's new regulations on student publications violated the Court's prior injunction (307 F.Supp. 1238), which stated that:

> ". . . the peaceful, orderly, non-coercive distribution of written material before the commencement of classes in the morning and after the conclusion of classes in the afternoon by students lawfully on or off the premises of the school in which they are enrolled shall not be prohibited unless, under the circumstances, such distribution substantially and materially interferes with some normal classroom activity or normal school function as those phrases

are hereinabove defined." (333 F.Supp. 1149, at 1152)

The board then passed a regulation which prohibited all sales of publications, including sales at places *adjacent* to school premises in the mornings before normal class activity had begun, if such sales resulted in possession by students on school premises. (333 F.Supp. at 1154) The Court held that this constituted a violation of said injunction since it prohibited all sales *before* school, irrespective of disruption or the place of the sale.

Sullivan is readily distinguishable from the facts and rules of the case at bar. In *Sullivan*, the Court did not discuss the power of the board to regulate commercial activities in its schools. The board rule singled out the sale of student publications and made no attempt to regulate sales of other products. The ban on sales of newspapers applied to places entirely off the school premises. The student who was suspended for selling newspapers was not selling them on school property or during school hours. The Rules in the instant case are not similar since they do not apply to conduct exercised entirely outside school hours and off school premises but only restrict the right to use school property for commercial activities. Thus, the *Sullivan* decision is not a valid justification for the invalidation of these Rules.

Since the *Sullivan* decision was the major case relied upon by the District Court for all of its rulings, it should be noted that it was vacated by the Fifth Circuit, 475 F.2d 1071 (1973). The Court upheld the student's suspension and said that it cannot be seriously urged that the Board's new prior submission rule which, among other things, absolutely prohibited the sale of publications on school premises is either unconstitutionally vague or overbroad.

(2) *Riseman.*

The District Court also cited *Riseman v. School Committee of City of Quincy* (1st Cir., 1971), 439 F.2d 148, as support. (Findings of Fact and Conclusions of Law, Petition Cert. App. 4A) (Petition Cert. hereinafter "Pet.") The rule and facts of this case are completely irrelevant to those in the case at bar. The rule in *Riseman* prohibited the use of school facilities for advertising or promoting the interests of any community or non-school agency or organization *without Committee approval.* The Court held that this was unconstitutional, *as applied* to a student who sought to distribute material of a political nature (Student Bill of Rights and Information on Viet Nam), and was also invalid because no effort was made to minimize the adverse effect of *prior restraint.* It also noted that the rule appeared devised for a quite different purpose, *i.e.*, to control advertising or promotional efforts of organizations in the school. The Court did *not* say that such purpose was not legitimate or that the school could not prohibit such commercial activity. It was concerned only with two aspects of said rule: (1) the fact that the requirement of *prior approval* was not accompanied by any procedural safeguards, and (2) the unwarranted *application* of said rule to prevent student distribution of material without prior approval of its content.

In the case at bar, the present Rules prohibting sales or solicitations contain no prior restraints and cannot be applied to prohibit or require approval of the distribution or contents of student literature. Thus, *Riseman* is immaterial and cannot be used for support for declaring said Rules unconstitutional.

(b) *Court of Appeals case.*

In declaring the Board Rules fatally overbroad, the Court of Appeals relied on the constitutional standard for overbreadth set forth by this Court in the *criminal* case of

U. S. v. O'Brien (1968), 391 U.S. 367, 20 L.Ed.2d 67[illegible] *reh. den.*, 393 U.S. 900. This decision upheld the convict on of a man under a statute which made the knowing destruction or mutilation of a "draft card" a criminal offense. In determining that this statute was not overbroad, this Court applied the following four-pronged test:

> "... A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. at 377)

The Court of Appeals did not explicitly apply this test to the instant case, but implied that the Board Rules did not meet its following two requirements:

(1) *Governmental interest unrelated to the suppression of free expression.*

The Court of Appeals seemed impressed with plaintiffs' suggestion that the amended Board Rules were simply a deliberate device to suppress the distribution of student newspapers (Pet. App. 25A), despite this Court's caution that legislative motive is not a proper basis for declaring a statute unconstitutional. *U.S. v. O'Brien, supra,* at 384. Yet the original Board Rule requiring prior approval of all sales and solicitations at school was in effect many years before this cause of action. In addition, there was not one shred of evidence to support plaintiffs' suggestion that such was the motive, purpose or effect of the Rules. In fact, the only evidence is that the basic governmental interest in prohibiting sales and solicitations in the schools is simply to insure the smooth and proper functioning of the schools. (App. 12, 43) The other governmental interests discussed by the courts in *Cloak* and *Katz, supra,* are

closely related to this basic goal. All of these legitimate interests would be defeated by permitting sales and solicitations at school. None of these interests are related to the suppression of free expression. It should also be noted that these Rules do not prevent students from selling products anywhere but in the schools and do not prevent students from giving away newspapers before or after classes.

(2) *Incidental First Amendment restrictions no greater than is necessary to further governmental interests.*

In order to accomplish these valid governmental purposes, the school must be able to regulate and prevent any conduct which causes disruption or delay of classes, or congestion in the halls during the brief (0-5 minutes) passing time allotted between classes. It is essential to remember that there is a marked contrast between the setting of an elementary or high school and a university campus. Students in grades 1-12 have no "free time" and are required to be in a class or supervised study or activity virtually every minute of the school day. In some schools, particularly elementary and junior high, students are escorted from class to class. Even lunch periods are highly structured and regulated so that hundreds or thousands may eat in a very short time.

Thus, school officials in light of these special circumstances and the necessity to protect the school routine and proper operation of the school, determined that, with few exceptions, they cannot and should not set aside a time and place in the schoolhouse for either students or outsiders to solicit funds or sell products to other students. As in *O'Brien, supra*, both the governmental interests and the scope of the Rules are limited to preventing harm to the smooth and efficient functioning of the schools. The Rules cannot be more narrowly drawn to protect these

interests and assure good order in an educational atmosphere. Commercial activities, with a few exceptions permitted by the Rules (*i.e.*, yearbooks, raising funds for a school band, etc.) simply are non-school activities which have no place in the schoolhouse. For the Court of Appeals to insist that the Constitution requires a schoolhouse to be turned into a literal marketplace and its belief that the interests of good order and an educational atmosphere can be adequately served by regulating the time, place and manner of sales and solicitations reveals that the Court does not understand the routine or operation of an elementary or secondary school.

The Board submits that even applying the test in *O'Brien, supra,* to the case at bar, the two Rules in question meet all four of those requirements. It is clearly within the constitutional power of school boards to regulate the use of property under its control and to control student conduct to insure good order so that educational objectives may be accomplished. This Court has repeatedly affirmed that an important governmental interest lies in the implementation of "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker, supra,* 393 U.S. at 507. The two Rules protect the substantial governmental interests discussed above, all of which are unrelated to the suppression of free expression. In addition, the Rules proscribe only non-expressive features of student conduct which raise a sufficiently high probability of harm—*i.e.*, the pressures upon students of multiple sales and solicitations and interference with the smooth and efficient functioning of the school. Therefore, any incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of said interests.

Although no vivid imagination is required to visualize the disruption that would result if the Board could not

prohibit sales and solicitations at schools, it is significant to note that in neither case upholding the right of the Board to prohibit sales and solicitations in schools (*Cloak* and *Katz, supra*) was there any evidence of a specific incidence of interference by the students with the operation of the school, or of any demonstrable collision with the rights of other students to be let alone. Both Courts considered the absence of any actual physical disturbance to be immaterial. The Court in *Cloak, supra,* said that plaintiffs' reliance upon *Tinker, supra,* was misplaced, since there was no First Amendment right involved and there was no attempt to prevent a student from giving away or distributing his newspapers in any manner he saw fit. (326 F.Supp. at 396)

Moreover, in *Tinker, supra,* the school singled out for prohibition a particular symbol—black arm bands worn to exhibit opposition to the Viet Nam war. This Court observed that other symbols, such as the Iron Cross, were permitted, and said:

> "Clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible." (393 U.S. at 511)

Since *Tinker* was decided solely on this issue (regulation of the content of speech), it is not applicable to the Rules in question. However, commercial activities in schools are necessarily time-consuming distractions and are inherently disruptive of the function, order and decorum of the school.

5. RULE IS NOT VOID FOR VAGUENESS.

The District Court, but not the Court of Appeals, also held Section 1.3.1.5, void for vagueness, but did not indicate what was unclear or uncertain about it. This Rule

clearly prohibits students from selling or soliciting funds for literature in the schools and is far from being vague even under the strict tests for criminal statutes; instead of merely forbidding "sales and solicitations," it defines those terms so that conduct which constitutes a sale or solicitation is clearly set out.

A statute is complete, with respect to definiteness and certainty when its provisions are sufficiently definite to enable one to know from its language whether it applies to him and to be able to ascertain therefrom his rights and obligations. *Varney v. Warehime* (6th Cir., 1945), 147 F.2d 238, *cert. den.* 325 U.S. 882.

For the five reasons discussed above, the two Board Rules governing sales and solicitations at school should be upheld.

B. DISRUPTION RULE 11.05, SECTION 1.1.1.3

Section 1.1.1.3 of Rule 11.05 (hereafter referred to as the Disruption Rule) provides:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis Public Schools, or injury to others."

Both courts held this rule facially void for vagueness and overbreadth.

The District Court gave no reason for its ruling but suggested that the following wording of this rule would be more apt to be constitutionally acceptable:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a substantial and material inter-

> ference with, or delay of normal classroom activity or normal school function." (Pet. App. 14)

The Board respectfully submits that it is not the proper function of a court to declare a rule so vague as to deny due process simply because it preferred other terminology which has the same meaning.

For the following reasons, the Court of Appeals erred in holding this rule void for vagueness and overbreadth. First, the Court's overbreadth reasoning, while it may be a useful or even valid method of reviewing a criminal statute affecting First Amendment rights, was improperly applied to a Board regulation which is not a statute and imposes no criminal sanctions.

The District Court and Court of Appeals have placed the Board on the horns of a serious dilemma. The District Court told the Board that its amended rule requiring prior review of student materials would be held unconstitutional. Opinions of the Court of Appeals clearly indicated that it shared this view and would invalidate a rule requiring prior review of student literature even if it was accompanied by elaborate procedural and substantive safeguards. *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355. In an effort to avoid future litigation and comply with the District Court's order to submit new rules (App. 2), the Board further amended its rules to allow only subsequent review and punishment which the Board preferred not to do, but which was the only alternative left open.

Then the Court of Appeals refused to follow the traditional and restrained approach which is to judge the rule in terms of the result worked by its application in the instant case. Instead, it subjected the Board to facial tests for vagueness and overbreadth used to judge the constitutionality of criminal statutes because of the alleged seriousness of the subsequent restraints forced upon the Board by the Court.

The Court of Appeals obviously believes that its proper role is to attack a Board regulation on its face and declare it void if it can conjure up some hypothetical invalid applications in imagined situations not before the Court. The Board submits that rigid constitutional constraints such as these, which are imposed by a judiciary untrained in the problems of operating public schools has the effect of precluding the exercise of prudent judgment by those knowledgeable and experienced in public school administration.

Unless the bare terms of the Board rules reveal inescapable and thoroughgoing invalidity, the Court's proper role is to eliminate unfair applications as they arise. However, the Court refused to allow the Board any opportunity to apply the rules. They were never even applied to the claimants in this case.

The Court's facial approach, if sustained by this Court, will have a tremendous and tragic effect on the administration of elementary and secondary schools in this country. If any student is disciplined for flagrant violation of a Board rule or wishes to challenge a Board rule, then under the Court's method of review of the regulation, if the student or Court could suggest hypothetical impermissible applications of the rule, it would be declared void on its face and the student could escape any punishment even if his own conduct was not privileged or protected. (Pet. App. 21.) Since it is difficult to think of a Board regulation that is utterly devoid of potential for unconstitutionality in some conceivable application, the Court could effectively abolish any Board policy it deemed unwise. The Board submits that this is exactly what the Court did when it declared the Disruption Rule void.

Second, the general rule on vagueness, as it has been developed in connection with the construction of criminal statutes, is that all that is required is that the language "conveys sufficiently definite warning as to the proscribed

conduct when measured by common understanding and practices." *U. S. v. Petrillo* (1947), 332 U.S. 1, 8, 91 L.Ed. 1877. Even measured by this criminal standard of specificity, the rule is sufficiently definite. It is quite clear what the rule as a whole prohibits, although the Court concludes that students could not be expected to understand the meaning of such common words as "disruption" or "significant." The Court of Appeals also appears to contradict itself where it poses hypothetical questions asking whether (and concluding that) the rule threatens punishment for students who distribute a pamphlet resulting in robust arguments or for distribution of a paper including derogatory remarks about a teacher, and at the same time concludes that school authorities could not reasonably forecast a substantial disruption from such incidents. However, the rule regulates *only* distribution that causes or is likely to cause a significant disruption. In addition, this Court has said that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *U. S. v. National Dairy Corp.* (1963), 372 U.S. 29, 32.

Third, many other courts have examined similar Board rules and phrases and found them neither overbroad nor too vague. For example, in *Eisner v. Stamford Board of Education* (2nd Cir., 1971), 440 F.2d 803, all literature to be distributed in school was to be submitted for prior approval by a school administrator who was to apply the following guideline:

> "No material shall be distributed which, either by its contents or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others." (440 F.2d at 805.)

Note that the *Eisner* rule was to be used as a basis for *prior* censorship and did not even specify that the dis-

order be either material or substantial. However, the Court explicitly assumed that the Board would not contemplate suppression of matter that would create only an immaterial disturbance.

In *Sill v. Pennsylvania State University* (M.D. Pa., 1970), 318 F.Supp. 608, aff. 462 F.2d 463, a school regulation forbidding activity that "unreasonably" interfered with school "operations" was held sufficiently specific. Since most courts, including the Seventh Circuit[1] use the words "school functions, work, purposes, processes, procedures and activities" interchangeably, the Board rule should not be held void for vagueness for using the same terminology.

Fourth, the Board rule, like the *Eisner* rule "departs in no significant respect from the similarly very general and broad instruction of *Tinker* itself." *Eisner, supra,* 440 F.2d at 808. This Court repeatedly stated in *Tinker, supra,* that it was permissible to regulate student expression if it was necessary to avoid material and substantial interference with "discipline, the work of the school or the rights of other students." (393 U.S. at 508, 509, 511) This is exactly what the rule in question purports to regulate and nothing more.

Fifth, this rule is not facially overbroad because it does not purport to prohibit a significant class of protected activity. This Court has repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. *Parker v. Levy, supra.* It said in *Parker*:

> "Thus, even if there are marginal applications in which a statute would infringe on First Amendment

[1] In *Scoville v. Board of Education Joliet Twp. H.S. District 204* (7th Cir., 1970), 425 F.2d 10, 15, the Court said that the Board must reasonably forecast that student distribution of a paper would "substantially disrupt or materially interfere with school procedures" before it could justify expulsion.

> values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 580-581 (1973). And the Court recognized in *Broadrick, supra,* that 'where conduct and not merely speech is involved' the overbreadth must 'not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' 413 U.S. at 615." (p. 25)

Sixth, the rule sets standards for enforcement which are not subjective, but are readily determinable and easily understood within the framework of the public school system. Seventh, the courts should not hasten to strike down a school regulation on its face that is so clearly and reasonably relevant to the lawful mission or function of the educational institution, particularly before the Board has even been given an opportunity to apply it to a given fact situation.

Eighth, to the extent that the disruption policy on its face serves to discourage certain forms of expression in the school atmosphere, this limited curtailment is well within the power of the state. As this Court stated in *Younger v. Harris* (1971), 401 U.S. 37, 51, 27 L.Ed. 2d 669:

> "Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

Ninth, implicit in the Court's conclusion that this rule is fatally overbroad is the premise that students should

be able to cause *some type* of significant disruption in the school for which they could not be disciplined. This is revealed by the Court's statement that: "expression may lead to disorder under many circumstances where the expression is not thereby deprived of First Amendment protection." (Pet. App. 21) Since there is no normal educational purpose, function or process which students should be permitted to significantly disrupt, this rule is not unconstitutional for overbreadth.

Tenth, for the many other reasons stated in Question 1, the Court's invalidation of this rule should be reversed.

COURT'S INJUNCTION IS OVERBROAD

A crucial part of the issue of overbreadth raised in, but ignored by, the Court of Appeals, is that part of the District Court's Order, which permanently enjoins the Board from the promulgation or enforcement of any rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to written material, . . ." (Pet. App. 14) The Court of Appeals, in affirming the District Court's decision, upheld but failed to mention this broad injunction, although it completely undermines the legal authority and duty of the Board to formulate rules governing distribution of student literature in its schools. Under Indiana law (Ind. Stat. Anno. Section 28-5358 *et seq.*), students may not be suspended or expelled unless they have violated a written rule approved by the Board. Yet any such rule which would be held permissible under the guidelines of this Court in *Tinker, supra,* would constitute a violation of this broad injunction. Thus, this injunction should be vacated for overbreadth since the principles announced by this Court in *Tinker* would clearly allow school authorities to discipline students who distribute materials which cause riots or reactions which substantially disrupt or interfere with school discipline or activities.

Since the Court's injunction prohibits the Board from disciplining students for written material which is not constitutionally protected, i.e., language which causes disruptive "reactions," it also conflicts with the unassailable power of the State to suppress "fighting words—which by their very utterance inflict injury and tend to incite an immediate breach of the peace," recognized by this Court in *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, or words which "have all the effect of force," *Near v. Minnesota ex rel. Olson* (1931), 283 U.S. 697 at 716.

C. STUDENT DISTRIBUTION OF ANONYMOUS LITERATURE OR LITERATURE WHICH IS NOT WRITTEN BY A STUDENT OR SCHOOL EMPLOYEE.

The two amended Rules which subject students to disciplinary measures for distributing anonymous literature or literature which is not written by a student or school employee were declared unconstitutional prior restraints by the District Court. Presumably, they would have been upheld by the District Court had it believed they required no prior censorship or approval of student literature. The brief submitted by the Board to the Court of Appeals defined and differentiated between prior and subsequent restraints and pointed out that since these Rules did not require that students submit materials to obtain approval prior to distribution, they do not permit any prior censorship. The Court of Appeals apparently agreed but declared both Rules unconstitutional for overbreadth.

1. RULE 11.05, SECTION 1.1.1.4. REGULATING LITERATURE NOT WRITTEN BY STUDENTS OR SCHOOL EMPLOYEES.

This Rule provides:

> "No student shall distribute in any school literature that is not written by a student, teacher, or

other school employee; provided, however, that advertisements that are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

The Court of Appeals, though it assumed the validity of this Rule in some areas, held it overbroad because "it would prohibit use of materials written by individuals from all sorts of walks of life whose views might be thought by the students to be worthy of circulation." (Pet. App. 22-23) The Board disagrees because this Rule does *not* prevent students from using or quoting the ideas of others. Students remain free to write or express any view, their own or others.

The Board submits that the First Amendment rights of *non-students* is not an issue in this case and that it is within the Board's discretion to prohibit the use of its schools for student distribution of literature written by non-students or other persons not connected with the school. Put another way, since non-students or outside organizations have no legal or constitutional right to sell or distribute anything, including printed material, in the schools, they cannot subvert this basic principle by having students distribute their material.

While it may not be reasonable to restrict student expression at school, no court has held that it would be unconstitutional to limit student newspapers to publishing articles written by students. *Antonelli v. Hammond* (D.Mass., 1970), 308 F.Supp. 1329, indicated that such a rule, even at the college level, might be reasonable.

As support for its ruling, the Court of Appeals cited one case, *Police Department of Chicago v. Mosley* (1972), 408 U.S. 92, 33 L.Ed.2d 212, in which this Court held unconstitutional a criminal disorderly conduct ordinance condemning picketing near schools except the peaceable picketing of any school involved in a labor dispute. It declared

that the ordinance violated the equal protection clause since it described permissible picketing in terms of its subject matter and made an impermissible distinction between labor picketing and other peaceful picketing.

This case is not valid support for holding the Board Rule unconstitutional for overbreadth for the following reasons. First, a criminal ordinance should not be compared to the School Board's regulation for the many reasons discussed above. Second, a schoolhouse is not a public forum in the same sense as sidewalks or streets. Before the Board Rule can be held unconstitutional, it must be shown that non-students and outside organizations have a constitutional right to use the particular place (schoolhouse) where they seek to speak or distribute materials. The Board submits that such outsiders have no right to distribute their written material at school or to use students to reach the vulnerable captive audience found in every school. Third, the main objection in *Mosley, supra,* was that the ordinance described permissible picketing in terms of the *subject matter,* permitting picketing only on the subject of a school's labor dispute. The Board Rule places no restrictions on the subject matter or views expressed by students.

If the school must open its doors to all outsiders who have, or think they have, something to say, the school could not accomplish its educational objectives. This Rule is essential to prevent the distraction and interference with school functions which would result if students were permitted to sell or distribute materials written by non-students and outside organizations. It is a legitimate interest of the Board not only to prevent the use of the school for non-school purposes, but also to protect students who would become the tools of outsiders who seek to reach and influence the captive audience of immature minds at schools.

Thus the Rule is reasonable and is essential to protect legitimate governmental interests and since it places no restrictions on what students can quote or write, it does not violate their First Amendment rights.

2. RULE 11.05, SECTION 1.3.1.6. — ANONYMOUS LITERATURE.

Section 1.3.1.6. of amended Rule 11.05 provides:

> "No distributable literature shall be distributed by any student in any school unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

This Rule is essential to protect several compelling interests and legitimate goals of the Indianapolis public schools.

First, such a rule is necessary to identify those responsible for fraud, libel and obscenity. Because the right of free speech or press is accompanied by correlative responsibility for its abuse and this Rule provides the *only* reasonable means to fix responsibility for such abuses it must be upheld.

Second, in view of the fact that the lower courts permit no prior censorship of any material distributed by students at school, and also require the Board to set aside times and places in schools for such distribution, the Rule aids in protecting the Board and school officials who would be subjected to lawsuits for permitting distribution of materials which are obscene or contain libelous or fraudulent statements or cause riots or substantial disruption of the school.

Third, the school has an awesome duty to protect the children in its charge, and this Rule enables them to accomplish this responsibility. Since children at school constitute

a vulnerable captive audience, persons should not be able to hide behind the cloak of anonymity to promote obscenity, drugs, riots and other crimes.

Fourth, this Rule would also provide the only reasonable means of enforcing Section 1.1.1.4. of Rule 11.05, should it be upheld by this Court. Alternatively, if Section 1.1.1.4. is not upheld and students are permitted to distribute materials written by non-students or persons not connected to the school, it becomes even more imperative to disclose those responsible for such publications.

This rule is also made necessary and reasonable in view of the fact that the *Corn Cob Curtain*, unlike the press generally, has *no editors* and no person in charge and prints any article received at a post office box, as is, without any editing. (App. 28) Since it is the policy of the anonymous persons responsible for this newspaper not to edit or divulge the authors of any articles, persons are encouraged to write libelous or obscene articles since they could not be held responsible.

The Rule could not be more narrowly drawn to accomplish these legitimate goals and interests. It should be noted that the Rule does not impose any prior restraints and places no restrictions upon what can be said, where it can be said or when it can be said. No attempt is made to require authors to publish their sources of information; they remain free to seek news from any source. The Rule is also limited to literature which is to be distributed at elementary and secondary schools so students remain free to distribute anonymous literature beyond the schoolhouse gate. This Rule simply requires that a student who exercises his right of free speech through a student publication identify himself just as one who speaks from a school platform or in a classroom. All students in school are required to identify themselves if requested because anonymity has no place in the specialized environment of a school if it is to function properly and achieve its goals.

(a) *Cases Relevant to Section 1.3.1.6.*

Only one case was found which ruled on the precise question at issue. In New York the commissioner rejected a challenge to the board regulation requiring the names of the authors and publishers to appear in the student publication. The same obligations of responsible journalism which pertain to official student publications and the public press apply as well to "unofficial" student newspapers. "The concept of anonymity is inconsistent with the requirements of responsible journalism." *Matter of Schiener*, 11 Ed. Dept.Rep. —, N.Y.Comm. Dec. No. 8467. *In Eisner v. Stamford Board of Education* (1970), 314 F.Supp. 832, even the plaintiff student acknowledged that the board of education had power to require that each article identify its author. In *Sullivan v. Houston Independent School District* (5th Cir., 1973), 475 F.2d 1071, the school rule required that the publications to be distributed at school contain the names of the contributors, editors and publishers. Although this particular section was not at issue, the Court noted that the rule was neither vague nor overbroad. This Court in *Lewis Publishing Co. v. Morgan* (1913), 229 U.S. 288, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner and stockholders. A direct analogy can be made to the instant case. The Board's control over the use of its schools may be compared to the government's control over the use of its mails.

In addition, most states have statutes prohibiting the anonymous distribution of materials relating to political campaigns. *Talley v. California* (1960), 362 U.S. 60, 70, 4 L.Ed.2d 559, 566. This Court upheld the Federal Regulation of Lobbying Act, in which Congress requires those engaged in lobbying to divulge their identities and certain other information. *United States v. Harriss* (1954), 347 U.S. 612, 625, 98 L.Ed. 989. This Court's response to the argument that some persons may choose to remain silent

because of fear of possible prosecution for failure to comply with the Act was that "even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self censorship . . .". (347 U.S. at 626) The Board submits that any similar deterrent effect its Rule might have upon a student's speech is too indirect, speculative and insubstantial to justify holding the Rule unconstitutional.

In *Talley v. California, supra*, this Court declared overbroad an ordinance making it a *criminal* offense to distribute "*any* handbill in *any* place under *any* circumstances" unless it contained the names and addresses of the persons who printed, wrote, compiled, manufactured or distributed it. It is the opinion of the Court of Appeals that *Talley* requires the Board Rule to be limited so as to apply only to libelous or obscene articles. However, it would be both ridiculous and futile for the Board to require only the authors of such materials to identify themselves. The above statutes upheld by this Court, which were designed to present the same abuses, were not so limited. It is these cases rather than *Talley* which control the instant case and require approval of the Board Rule.

D. DISTRIBUTION DURING CLASS HOURS.

Both courts declared unconstitutional for ovebreadth Section 1.3.1.1. of amended Rule 11.05, which reads as follows:

> "No distributable literature shall be distributed by any student in any school while classes are being conducted in the school in which the distribution is to be made."

The District Court said that the Board could prohibit distribution of literature *at times* and *in places* where *normal classroom activity* is being conducted. (Pet. App. 13) Normal classroom activity was defined by the Court as any organized educational activity under the

direct supervision of a school official. Thus the Board's Rule is not any more broad than what the District Court itself sanctioned in its injunction. Both clearly prohibit distribution when classes are in session, which is generally 8:30 a.m.-3:30 p.m. The *places* of said classes are obviously all throughout the school. Thus there is no constitutional significance in the fact that the Board Rule prohibits distribution *in the school* while the District Court sanctioned prohibition *at places* where normal classroom activity is being conducted.

The Court of Appeals for the Seventh Circuit apparently concedes that it is constitutionally permissible to prohibit distribution in the classroom itself or elsewhere in the schools if all the students are required to be in a class. However, it apparently based its ruling of overbreadth on the assumption that there are periods when substantial numbers of students are in school, but are not involved in classroom activity at the time classes are in session for other students and that the Board could not reasonably forecast disruption if students distributed newspapers during this time. The assumption that some students would be at school and yet not in class while classes are in session is not warranted by the evidence. The only time this could possibly occur would be during a split lunch or split assembly period. If the school was small enough so that all students ate at the same time, then distribution in the cafeteria would not be prohibited by this Rule. Also, to prohibit distribution of literature in a split lunch or assembly period is not an impermissible infringement upon students' First Amendment rights, since it is not unconstitutional to limit their uses as places to eat or watch programs.

The Board submits that *Grayned v. City of Rockford* (1972), 408 U.S. 104, a criminal case cited by the Court of Appeals as support, does not justify its position that this Rule is facially unconstitutional. This Court, in *Grayned*, stated that the "crucial question is whether the

manner of expression is basically incompatible with the normal activity of a particular place at a particular time" because "the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." (408 U.S. at 116) The Board Rule is simply a legitimate reasonable exercise of its power to regulate the time and place of distribution, since to allow distribution in the cafeteria where many students are required to eat in a brief period, or in an auditorium during an assembly, would interfere with the proper order and function of both.

It is important to remember that although in colleges and universities some students may be in class while others have no class, this is not the situation in elementary and secondary schools. Students in the Indianapolis public schools simply have no free time during school—they are in a supervised classroom, study hall or other activity every period of the school day.

This Court in *Tinker, supra*, recognized that First Amendment rights must be applied in light of the special characteristics of the school environment. Thus distribution which might be perfectly appropriate in another public place or in a college or university may unduly interfere with the highly structured activities of a primary or secondary school.

QUESTION THREE

Are words found throughout a student newspaper such as "f - - -," "eat shit," awarding points for the number of "freak girls screwed," and a cartoon picturing the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," obscene as to minors and can school authorities punish students for the use of such language in elementary and

secondary schools, even if such language is held to be filthy, vulgar, and indecent, but not legally obscene as to minors?

A. CORN COB CURTAIN IS OBSCENE AS TO MINORS.

Section 1.1.1.1. of amended Rule 11.05 subjects a student to disciplinary measures if he distributes in any school literature that is obscene as to minors. Although the validity of this Rule is not an issue since it was upheld by the District Court, the question remains as to whether the use of such language as quoted above in the *Corn Cob Curtain* (hereafter sometimes *CCC*) is obscene as to minors. The District Court made no ruling on the Board's claim that the *Corn Cob Curtain* was obscene as to minors. However, the Court of Appeals, with one dissent, clearly indicated that the *CCC* contained no material which could be considered obscene as to minors. (Pet. App. 28)

Although the Supreme Court has not specifically defined the concept of obscenity as to minors, it has indicated that the state in enacting criminal statutes, may adopt special standards for children which are broader than those embodied in criminal legislation aimed at controlling dissemination of obscene materials to adults. *Ginsberg v. New York* (1968), 390 U.S. 629, 640, 20 L.Ed.2d 195, 204. Thus "material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity may vary according to the group to whom the questionable material is directed or from whom it is quarantined." (390 U.S. at 636)

This Court, in *Ginsberg v. New York, supra,* advanced two basic interests which justify limitations upon the availability of sex material to minors. First, parents and teachers have the primary responsibility for children's well-being and a legislature could properly conclude that they are entitled to the support of laws designed to aid dis-

charge of that responsibility. Second, the State also has an independent interest in protecting the well-being of its youth. The State's interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well developed men and citizens" was also recognized by this Court in *Prince v. Massachusetts* (1943), 321 U.S. 158, 165, 88 L.Ed. 645, 652.

Ginsberg upheld a criminal statute containing a three-pronged test for judging the obscenity of material sold to minors which was virtually identical to the Court's statement of the elements of obscenity in *Memoirs v. Massachusetts* (1966), 383 U.S. 413, 418. Thus material is obscene as to minors when it (1) predominately appeals to the prurient, shameful or morbid interest of minors, and (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is utterly without redeeming social importance for minors.

Since this Court in *Miller v. California* (1973), 413 U.S. 15, decided *after* the hearing in the case at bar, rejected the *Memoirs* standard and set forth a new test of obscenity, the Board submits that the *Miller* standard could easily be adapted to "obscene as to minors" as follows: Material is obscene as to minors if:

(1) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest of minors, and

(2) the work depicts or describes sexual conduct in a manner patently offensive to prevailing standards of the adult community with respect to what is suitable material for minors, and

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value to minors.

Keeping in mind that the Board is attempting to regulate only materials distributed in its schools and would impose no criminal sanctions, the filthy language and cartoons found in the *Corn Cob Curtain,* some of which is reprinted at App. 57-63, should be declared obscene as to minors under either or both of the above standards.

The remaining question is to what is the standard of obscene as to minors to be applied in the case at bar? In other words, what constitutes the "whole?" It should be noted that in developing the "as a whole" test, the courts were generally reviewing books or pamphlets which contained only a single story or article, *i.e.*, a single dominant thesis or theme. It was quite natural under the circumstances for the courts to treat the entire physical object under scrutiny as the proper "whole" since it typically was a book, pamphlet or film which contained a single dominant theme. While this Court has embraced the "as a whole" standard, it has not yet defined the term with any specificity and has apparently never explicitly stated what constitutes the whole when one is reviewing a newspaper, consisting of numerous unrelated articles, each having a separate dominant theme.

It is submitted that each individual, unrelated article or cartoon in a student newspaper distributed at school must be considered a separate "whole." This proposition is not without substantial support even in adult criminal obscenity cases.

The rule in England is that a magazine or newspaper may be declared obscene on the basis of a single story or article contained therein. *R. v. Anderson, et al.* (1971), 3 All E.R. 1152. In this case a magazine called *Oz* contained many serious and wholly innocuous articles but also contained obscene articles and pictures. The Court held that in reviewing a magazine consisting of a number of distinct items, the test for obscenity should be applied to the individual items in the magazine. If, when so applied, the

test shows one item to be obscene, that is enough to make the entire magazine obscene. (p. 1158) Thus, in England, while a book containing a single theme is the "whole," each article in a magazine or newspaper is considered the "whole."

Many courts in the United States have also accepted the view that with regard to magazines and newspapers the "whole" means the individual story, cartoon or picture rather than the entire physical object under scrutiny. For example, in *Cincinnati v. Walton* (Ohio Mun., 1957), 145 N.E. 2d 407, the Court stated:

> "The prosecution has contended in its brief that the generally accepted requirement that in judging obscenity a book must be viewed as a whole does not apply to magazines where stories and pictures are not related to one another. In this the court generally concurs. The 'as a whole' test was built up by the courts to escape the absurd result that was produced when one took, out of context, isolated passages from a sincere book. But where the parts are not specifically related—where, as here, you have a succession of pictures and stories, each conveying an individual message—each can be judged individually." (p. 414)

The same view of the "whole" was also adopted in *Flying Eagle Publications, Inc. v. United States* (1st Cir., 1961), 285 F.2d 307 (obscene illustration in magazine considered separately and is not controlled by innocuous textual material); *People v. Kirkpatrick* (1970), 64 Misc.2d 1055, 316 N.Y.S.2d 37, *aff'd.* 329 N.Y.S.2d 769, *aff'd.* 343 N.Y.S.2d 70 (each individual cartoon story considered a separate "whole" in a magazine); *People v. Pocket Books, Inc.* and *People v. Hamilton News Co.* (1963), 38 Misc.2d 1004, 239 N.Y.S.2d 631 (each story, article or picture considered separate "whole" in a magazine); *People v. Wasserman* (1970), 27 Mich.App. 16, 183 N.W.2d 313 (each article or story in a newspaper considered separately);

People v. Richmond County News, Inc. (1961), 216 N.Y.S. 2d 369, 9 N.Y.2d 578 (individual story or picture in magazine); *Scherr v. Municipal Court for Berkeley-Albany Judicial District* (1971), 15 Cal.App.3d 930, 93 Cal.Rptr. 556 (individual unrelated article in newspaper).

In *State v. Kois* (1971), 51 Wis.2d 668, 188 N.W.2d 467, 473, the Court stated:

> "The material taken as a whole cannot and should not encompass the entire newspaper, but should be restricted to that part which is materially associated in continuity and unity of thought with the alleged obscene matter. A novel or a movie is a unified whole, a complete story, which has unity and coherence of thought and purpose."

On appeal the defendant's convictions on two counts were reversed by this Court in *Kois v. Wisconsin* (1972), 408 U.S. 229. Nevertheless, this Court refused to reverse the Count 1 conviction on the ground that the court erred in not considering the entire newspaper as the proper "whole." In applying the *Roth* standard, the Supreme Court apparently did not focus its attention upon the entire newspaper, but rather considered an individual article and two accompanying pictures as the proper "as a whole" to which the obscenity test should be applied. (408 at 231)

Defendant was convicted on Count 2 for publishing another newspaper issue which contained two pages of poems, of which one was entitled "Sex Poem." Here again, this Court on review apparently did not focus its attention upon the entire newspaper as a physical object, but considered the proper "whole" to be at most the two pages of poems. The Supreme Court said:

> "In this case, considering the poem's content, and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art.

> While such earmarks are not inevitably a guarantee against a finding of obscenity, and while in this case many would conclude the author's reach exceeded his grasp, this element must be considered in assessing whether or not the 'dominant theme of the material appeals to the prurient interest' . . . We do not believe that it can be said that the dominant theme of this poem appeals to the prurient interest." (408 U.S. 231-236)

Regardless of whether this Court accepts an individual newspaper item containing a single theme as the proper whole to which an obscenity standard may be applied in a criminal case, it is submitted that this is the only reasonable method of judging a student newspaper to be distributed among juveniles in kindergarten through high school.

The consequences of considering the entire newspaper as the proper whole would be tragic. The obvious result would be that material which is obscene could be disseminated to children with impunity under the protective umbrella of physically connected, but otherwise unrelated non-obscene material. Since it would be so simple to add or include innocuous subject matter in any newspaper containing material which, by itself, is obscene, no newspaper would be found obscene.

The blazing headline of one issue of the *Corn Cob Curtain*, "ON YOUR ASS," which is totally unrelated to the article beneath it (App. 58), the vile toilet cartoon (App. 62-63), assigning points for the "number of freak girls screwed" (App. 57-58), the use of filthy words such as "f - - -," "eat shit," "f - - - off," are all obscene as to minors and have no proper place in a newspaper to be distributed to children at school.

This Court can also take judicial notice of the tendency of most juveniles to "zero in" on filthy language and pictures. They seem to attract children like a magnet. Such

language can only appeal to the prurient, shameful interest of minors. It can scarcely be contended that the four-letter words appeal to their intellectual or educational interest.

All of the evidence in this case (with the possible exception of a few self-serving statements of some of the claimant-students), reveals that the *CCC* is obscene as to minors. Affirmations signed by the principals of Indianapolis high schools and 220 parents (App. 63-64) indicate that the bomb cartoon (App. 62-63) and the definition of a hippie (App. 57-58) are offensive, embarrassing, disruptive and obscene as to minors applying the *Memoirs-Ginsberg* standard.

The affidavit (App. 11-17) of Dr. Karl Kalp, who has been with the Indianapolis School System since 1948 and is now Superintendent, states some of the harmful effects of allowing obscene, indecent material in the schools. He believes that it would, in addition to harming the students, cause unrest, distractions and disruption, a lack of respect for teachers and administrators, and would lower the morale of teachers who "will despair of trying to teach anyone about decency and moral obligations and responsibilities . . ." (App. 16) No counter affidavits were offered.

The claimant students testified that they did not write any of the obscene words, phrases or cartoons found in the *CCC*. (App. 32, 40) Susan Chandler (student claimant) said the four-letter words "weren't necessary" for her to use and she thought it was improper to use such language at home. (App. 42) Jeff Jacobs testified that neither he nor his friends used "language like that, especially in articles that go before the people." (App. 32-33); that it upsets him to be around people who use these four-letter words; and that he probably wouldn't associate with such a person. (App. 38) The students' counsel indicated that Jeff would be embarrassed if required to read articles containing the four-letter words. (App. 35-36)

Although two of the four judges stated that the *CCC* was not obscene and clearly it would not be legally obscene for adults, the Board submits that the lewd, filthy language which constitutes an inescapably dominating part of several articles, if not the entire newspaper, is obscene as to minors and that it is not unconstitutional for school authorities to prevent the distribution of such filth to school children or to reprimand and punish students who distribute it at school.

B. SCHOOL AUTHORITIES CAN DISCIPLINE STUDENTS WHO USE OR DISTRIBUTE SUCH LANGUAGE EVEN IF IT IS HELD TO BE FILTHY, VULGAR AND INDECENT, BUT NOT LEGALLY OBSCENE.

There are countless valid reasons for, and substantial educational interests to be served by prohibiting the use and distribution of filthy, indecent language in schools housing kindergarten through grade 12 students.

First, the student body of any primary or secondary school is a "closed" group which neither the pupil nor his parents have any choice about joining. As such, it is reasonable that parents expect that the Board, their elected representatives, should exert influence to maintain a quality of literature on the school grounds—in classrooms and outside the classrooms, that reflects and is commensurate with the goals of education that are accepted by society in general and the local community in particular. Public education cannot survive with any other basic concept. (Kalp's affidavit, App. 14)

Certainly parents who do not allow their children to use, read or hear this kind of language at home have the right to demand and expect that they will not be subjected to such filth in the schoolhouse. To deny them this reasonable expectation, especially when the state forces them to send their children to school, would constitute an outrageous

and disgusting injustice. The result can only be the most vulgar society imaginable. If this is to be the course of our schools, then by all means let us get on with it. If it is not to be the course of our schools and country, let us say so and be done with it.

Second, if this Court holds that children must be permitted to use and distribute gutter language in the schoolhouse then it will be impossible to obtain any basic level of decency or an academic atmosphere, both of which are essential for learning to take place. The conclusion of two members of the Court of Appeals that the use of such language as is found in the *CCC* is not likely to materially impair the accomplishment of educational objectives is wishful thinking at best. Not one shred of evidence supports this naive belief. It also ignores and rejects the expertise and judgment of Dr. Kalp who stated (App. 15-16) that if the school permits distribution at school of the vulgar, obscene and defamatory language contained in the *CCC*, it is in effect lending its support and approval to that kind of material, and at the same time trying to teach children the use of proper language and the avoidance of vulgarity, crudity, obscenity and defamatory language. A contradiction such as this can only confuse and harm children. If children need not practice, at least in school, what is "preached" to them, the "preaching" or teaching is simply a futile waste of time.

Moreover, Dr. Kalp indicated that such a contradiction (between what is taught and practiced) would not exist long because "(m)any teachers will despair of trying to teach anyone about decency and moral obligations and responsibilities if this type matter is distributed in our schools." (App. 16)

Third, a great majority of the children in the school system would be very much opposed to the language contained in the *CCC* and would lose respect for an administration that encouraged or allowed its distribution. Once losing

respect for the administration, these children might also feel that there was no use in following the advice of adults who advised them in one fashion in the classroom and then approved distribution of offensive and obscene materials in the halls. (App. 15) Dr. Kalp believes that this

> ". . . definitely would discourage many students and cause them to lose faith in their teachers. We can all recount numerous situations where a young child has had only his teacher to look to for training with respect to moral codes, decency, honor and integrity. If this trust is shattered many of our children will have no desirable adult models to emulate." (App. 15-16)

Fourth, it is reasonable to forecast substantial distractions, delay of school work and disruptions in any elementary or secondary school where gutter language is sanctioned. "To satisfy the whim of an infinitesimal minority of the student body, the learning conditions for all students are imperiled." (App. 13-14) Does this Court hope that children are or will become so desensitized to four-letter words such as f---, that it would be unreasonable to expect their use to cause distractions and disruptions? When that point is reached it will be a signal that our society is in a state of moral decay and in danger of collapsing as have other civilizations in the past which have cast aside decent standards and self-restraint.

Alexander Pope succinctly summarized the result in "The Monster Vice" in 1705:

> "Vice is a monster of so frightful mien, as, to be hated, needs but to be seen; yet seen too oft, familiar with her face, we first endure, then pity, then embrace."

This Court in its review of countless criminal obscenity cases has undoubtedly seen more filthy literature than most persons in this country. The language and cartoons in the *CCC* will probably seem tame and harmless by comparison.

Hopefully this Court has not become insensitive to such language and to the fact that it is not how many times four-letter words appear in a student newspaper that is significant, but whether children should be exposed to these uninvited shocks at all in the schoolhouse. Fifth, Dr. Kalp's belief that some of the material contained in the *CCC* will create a danger of antisocial conduct or will probably induce its recipients to such conduct (App. 46, 47, 51) should not be dismissed as frivolous. Few persons seriously contend that indecent literature has no harmful effects on children.

Sixth, just as parents are charged with the discipline of children in the home, so too are teachers and school officials charged with the responsibility of the training and conduct of children while in school. Schools, like parents may be criticized and brought to task for failing to circumscribe the conduct of children in their charge. In order to accomplish educational objectives it is important for schools to teach students to utilize socially acceptable forms of speech and to present and discuss issues without resort to the utilization of shocking or indecent speech. If this cannot be taught in the schools, it cannot be taught anywhere. And this cannot be taught if school authorities are forbidden to reprimand and discipline students who use indecent language.

Seventh, surely school authorities have more authority and reason to control indecent speech by minors in the schoolhouse than federal courts have in disciplining adults who insert indecent matter in a brief.

Rule 11A of the Federal Rules of Civil Procedure reads in applicable part:

> "For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

Rule 40(5) of the Rules of the Supreme Court of the United States provides in part, as follows:

> "5. Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court . . ."

This Court could not be consistent in holding that the Board cannot demand decency in its elementary and secondary schools while permitting the federal courts to require decency in their courtrooms and in briefs.

The Board does not mean to suggest that these Court rules should be abolished or that they present any risk of suppressing ideas, but merely suggests that there is far greater justification for attempting to limit the exposure of children to indecency in the schoolhouse than in attempting to so limit the exposure of the adult judiciary.

Eighth, what possible benefit or value is to be derived from permitting children at school to express themselves in vulgar, obscene language such as "The *CCC* eats shit. Why don't you?" or "f - - - off" (App. 60, 62). Does not the following unanimous observation of this Court in *Chaplinsky v. New Hampshire, supra*, apply to the distribution and use of vile four-letter words by children in school?

> "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" 315 U.S. 568, 572.

Ninth, it is crucial for this Court to keep in mind the significant differences between the case at bar and all the criminal obscenity cases heretofore reviewed by this Court. In the instant case we are concerned, not with a statute, but with a *Board policy* and regulation; not with adults, but with *minors*; not with what is permissible to regulate in the general community, but only with what lan-

guage and conduct may be controlled in the *schoolhouse,* not with persons who are voluntarily seeking out filth, but with a *captive audience* of vulnerable children, not with criminal punishment and the necessary controls on this dangerous power, but with *mild disciplinary measures.*

Tenth, if this Court refuses to allow the Indianapolis schools to exercise control over the distribution of such foul language as is found in the *CCC,* it will deprive elementary and secondary schools across the nation of a duty, power and discretion they have had since public schools first opened their doors. Although few challenges to the power of schools to discipline students for indecent language have been presented to the courts, most courts considering the issue have upheld the school. See, *e.g., Baker v. Downey City Board of Education* (C. D. Calif., 1969), 307 F.Supp. 517 (upheld suspension of high school students for distributing off school property a student newspaper containing the words "f---" once, "bulls---" several times, two drawings of nude ladies and a drawing of President Nixon making an obscene gesture; *Goldberg v. Regents of University of California* (1967), 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (upheld expulsion of university students for their use of such obscenities as "pissed off," "f--," and "asshole."

For the above ten reasons (by no means an exhaustive list), this Court should uphold the right of the Board and school officials to exercise both prior and subsequent restraints against students who use and distribute the filthy language and cartoons contained in the *CCC* to children in elementary and secondary school. How to label such filth seems immaterial and does not diminish the need to maintain a basic level of decency and order in the schools so that vital educational objects may be achieved. If the word "f---" is not obscene as to minors when used in the schoolhouse, then obviously no four-letter word can be considered obscene as to minors. But even if this kind

of language is not legally obscene as to minors it has no proper place in the elementary and secondary schools. It seems rather ridiculous to allow the many restrictions on speech by students imposed by schools such as prohibiting students from whispering to others, or speaking in class without permission and then require the school to set aside a time and place in the schoolhouse for these same children to write and distribute gutter language.

QUESTION FOUR

PRIOR RESTRAINT. Does the United States Constitution prevent a school board from adopting reasonable rules which would require prior approval by school authorities of literature before its distribution in elementary and secondary schools?

The original Board Rule which was not appealed required the Superintendent's prior approval of all materials to be distributed at school, but did not contain any procedural or substantive safeguards. Because the Court of Appeals had declared a similar rule unconstitutional in *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355, the District Court ordered the Board to amend its Rule. (App. 1-2) The full text of this amended Rule is reprinted at App. 17-20. Although the amended Rule still required prior review of student literature, it added the procedural safeguards suggested by the Court of Appeals for the Second and Fifth Circuits, such as a prompt decision based on written guidelines, and judicial review. Despite these safeguards, the District Court again ordered the Board to submit new Rules (App. 2) because it believed no prior restraints were permissible. This order resulted in the second amendment of Rule 11.06, permitting only subsequent restraints, the provisions of which were discussed in Question Three.

The Board submits that the lower Courts' assumption that no prior restraints are constitutionally permissible is

erroneous and that the amended prior restraint Rule provides adequate substantive and procedural safeguards and should be upheld by this Court. In *Near v. Minnesota* (1931) 283 U.S. 697, 75 L.Ed. 1357, Chief Justice Hughes said:

> "The protection even as to previous restraint is not absolutely limited." (283 U.S. at 716)

And this Court, in *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, stated:

> "There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any constitutional problem. These include the *lewd* and *obscene*, the *profane*, the *libelous* and the *insulting or fighting words* . . . those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace." (315 U.S. 572) (Emphasis added)

More recently the view that prior restraints are not necessarily unconstitutional under all circumstances was reaffirmed by this Court in *Bantam Books, Inc. v. Sullivan* (1963), 372 U.S. 58, 70, n. 10.

These pronouncements give strong support to the various courts which have upheld the rights of boards of education to require prior restraints with respect to certain types of student expression, subject to substantive and procedural safeguards. If the bases for previously restraining student literature are clearly set forth in the school regulations and are valid, that is to say, such as would justify a subsequent restraint or punishment, then in view of the special nature and purpose of schools and the immaturity of its inhabitants, it is reasonable to permit prior restraints.

Such was the holding in *Eisner v. Stamford Board of Education* (2d Cir., 1971), 440 F.2d 803. The Court examined a prior restraint rule in the context of a secondary

public school and found the rule to be valid in principle although procedurally insufficient. The *Eisner* rule provided:

> "No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.
>
> "In granting or denying approval, the following guidelines shall apply.
>
> "No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others."

The Second Circuit held that this standard by which, school officials may prevent distribution on school property was neither overbroad nor too vague, since "it merely vests school officials . . . with authority which under *Tinker* they may constitutionally exercise . . ." (440 F.2d at 808) This standard is identical to the first guideline of the Indianapolis Board Rule. To be valid, however, the Court held that the following *procedural* deficiencies must be corrected:

(1) The rule must specify a definite brief period within which review of submitted material will be completed; (2) and specify to whom and how materials may be submitted for clearance; (3) and must require prior submission only where there is to be a substantial distribution of written material so that a student would not be required to submit a single note or periodical to the school before he could pass it to another student.

It should be noted that the Indianapolis Board Rule provides for all of these procedural safeguards. It requires only materials that will be generally distributed to be submitted to the principal and the school's decision must be

given the student by 9:00 a.m. of the second regularly scheduled school day following the date of submission. In fact, the Board Rule provides additional safeguards not required by the Second Circuit. If the material is not approved, the student must be notified in writing of the rejection and the reason for the rejection must be included. It also provides that the material is presumed to be approved for distribution if the student does not receive notice of the decision within the allotted time. In addition, the student is given the right to a prompt hearing if he desires to appeal the decision.

In *Shanley v. Northeast Independent School District* (5th Cir., 1972), 462 F.2d 960, a board policy which required the principal's prior approval of "the production for distribution and/or the distribution of petitions or printed documents of any kind, sort, or type . . ." was declared fatally overbroad because it required advance approval of the distribution of materials written by students at any time and in any place and for any reason and contained *no* substantive or procedural safeguards. It was also held unconstitutionally applied to suspend students who distributed a student newspaper entirely off school property and only before and after school hours where no disruption actually occurred or was reasonably foreseeable and the content of the paper was not obscene, libelous or inflammatory.

Nevertheless, the Court emphasized that it was not unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution and the Court would not limit prior restraint to only those materials which are obscene, libelous or inflammatory. (462 F.2d at 971)

In examining the authority of the Board to regulate student expression in its schools, the Court found the nature of the place in which the prior restraint operates to be of critical significance and said:

> "While a school is certainly a market-place for ideas, it is just as certainly not a market-place. The educational process is thwarted by the milling, mooing, and haranguing, along with the aggressiveness that often accompanies a constitutionally-protected exchange of ideas on the street corner. There is, of course, a substantive difference between schools and the street corner in terms of weighing the sometimes competing interests of a completely free flow of any and all expression with the requirement that there be order and discipline. Thus this court has endeavored to give 'careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner.' (Citations omitted) Because high school students and teachers cannot easily disassociate themselves from expressions directed toward them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities in a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms." (462 F.2d at 968-9)

For a prior restraint rule to be valid the Second Circuit in *Shanley, supra*, listed four procedural safeguards it must provide, all of which are contained in the Rule in the case at bar.

In fact, only one court, the Seventh Circuit, has said that prior restraints are wholly inappropriate in high schools. *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355.

Specific Substantive Guidelines of Amended Board Rule

All substantive guidelines except No. 6 and 7 are analyzed in other parts of this Brief. The sixth guideline for prior review of student literature provides:

> "No material shall be distributed which advocates lawlessness or a disregard of school rules."

Although school authorities in Indianapolis, like most school systems, believe that they have the inherent right and duty to counsel and discipline students who urge others to disobey school rules or laws, this power, particularly in the context of a rule of prior review, has seldom been presented to courts as a constitutional question. However, the Board submits that if elementary and high school authorities may constitutionally discipline students for such advocacy at school, it may also be constitutionally prevented.

In *Norton v. Discipline Committee of East Tennessee State University* (6th Cir., 1969), 419 F.2d 195, *cert. den.*, 399 U.S. 906 (1970), the court examined and upheld the authority of a college to suspend students for having distributed literature which was characterized as false, seditious, and inflammatory. The literature in question provided in part as follows:

> "And how has the ETSU student body reacted: Have they precipitated a revolution like French students? No. Have they brought about an entirely new and liberal administration like Polish students? —No. Have they been the forerunners of a new democratic spirit like Czech students?—No. Have they seized buildings and raised havoc until they got what they were entitled to like other American students?—No. What then have the ESTU students done? They have set upon their rears and let the administration crap upon their heads, that's what.
>
> . . .
>
> "Maybe students will get some sense and learn

> that this should cease and that the only way to see that it does is to stand up and fight. . . . Maybe students will learn that no matter what the despots who run this school say, students have the constitutional right to protest, demonstrate, and demand their rights; that women students may not constitutionally be campussed; that students may damned well wear what they want and say what they please. And, maybe just maybe, they will discover that there are student leaders, organizers to rally around so as to assault the bastions of administrative tyranny." (419 F.2d at 197-98.)

The court held that since this literature was calculated to cause disruption of school activities and to ridicule and show contempt for school authorities, the students were properly suspended.

The college students relied principally on *Tinker, supra,* and the fact that no violence or illegal actions followed as a consequence of their distribution of the literature. The Court of Appeals, however, viewed the literature as "an open exhortation to the students to engage in disorderly and destructive activity." (419 F.2d at 198.) The court held that college authorities have the right to nip such action in the bud, as they had done in this instance.

Constitutional protection of expression is, of course, always relative to circumstances, and it makes sense that greater freedom of provocative expression should be allowed on a college campus than in elementary or high schools. College students are older and presumably more mature, and the college campus is a type of community analogous to a town or city. The public grade or high school, on the other hand, is a building in which impressionable adolescents of widely varying backgrounds and abilities are confined and their attendance is mandatory. It stands to reason, therefore, that greater freedom to advocate rule violation or lawlessness would be tolerated constitutionally at the college level than in the lower grades.

In the primary and secondary schools, one reasonable way to nip destructive and disobedient actions in the bud is to prevent children from urging others to commit such acts.

The function of school principals and boards of education is to provide the best possible curriculum and instruction within their means. Time and effort dedicated to the problem of maintaining order should be minimized. That school authorities should spend their time and expend considerable psychological energy making predictions about the likelihood of the disruption consequent to the advocacy of lawlessness or disregard of school rules hardly seems an efficient utilization of resources. In any event, it makes little sense that the first disruption should be allowed. It would seem that the risk to order and an academic atmosphere in the schools, given their special and peculiar sociological problems, outweighs the libertarian interest in expression of this nature. Indeed, it is difficult to perceive any social value in such expression.

The Board's seventh substantive guideline for prior review provides:

> "No material shall be distributed which subjects school administrators and personnel to ridicule. Responsible criticism shall be allowed."

Ridicule or mocking disparagement of school authorities has no place in primary and secondary schools. Arguably, this limitation could be justified under the *Tinker* disruption principle, since mocking disparagement by its very nature interferes with the educational process. Clearly, if ridicule of a teacher or principal could be shown to cause substantial disruption in the school, it could be proscribed under *Tinker*, *supra*. But proof of the causal relationship between ridicule and interference with the educational process would be very time consuming and next to impossible in many cases. Such speech is qualitatively different from the speech in *Tinker* and should not be protected in view

of the special needs and purpose of the elementary and high school.

While student criticism of school policies, teaching methods and competence is salutary and constructive if conducted on a rational level, ridicule or mocking disparagement serves no constructive purpose and may have a deleterious effect upon the atmosphere and operation of the school in many subtle ways. Certainly, its impact upon the classroom effectiveness may be subtle in some cases. It is sometimes said that a teacher's reputation precedes him into the classroom. His effectiveness in the classroom is in large measure a function of student attitudes and expectations which are formed prior to actual exposure to his instruction. If the school tolerates ridicule of a teacher at school, tha teacher may find it virtually impossible to command the respect and attention necessary to properly conduct a class. Courts should be sensitive to the fact that there are serious potential consequences latent in certain types of speech which do not necessarily fall into the category of demonstrable disruption or interference as set forth in *Tinker, supra,* and that such consequences justify limitations upon speech of this kind in the schoolhouse.

Obviously, students are going to talk about their teachers and form attitudes. But to protect mocking disparagement in written form distributed at school to impressionable teenagers is unnecessary and unwise. In balancing the private interest in such speech against the public interest in a sound educational program, the latter far outweighs the former. In the community-at-large, the power of the state to proscribe obscenity is not founded upon a showing by the state that the obscenity has caused, or is likely to cause, some social disorder. It is constitutionally proscribable presumably because conventional wisdom considers it harmful. In any event, as far as obscenity in school is concerned, the *Tinker* standard would appear to be irrele-

vant. The same can be said for ridicule or mocking disparagement of school authorities.

Thus, it is submitted that a "clear and present danger" test with respect to ridicule or advocacy of lawlessness or disregard of school rules is inappropriate for the public school. School authorities should not be placed in a position of having to justify each limitation upon invitations to disorder. The test set forth in *Brandenburg v. Ohio* (1969), 395 U.S. 444, for the community-at-large properly allows for the widest range of social and political expression consistent with the maintenance of an orderly system of government, but the maintenance of an effective and orderly educational institution for minor children does not allow for such latitude in expression.

QUESTION FIVE

Did the Court err in holding that Rule 17(c) of the Federal Rules of Civil Procedure requiring the appointment of an appropriate representative for infants in litigation did not apply where a constitutional question was presented?

This case was brought by a group of minor children and after the Complaint was filed, the defendants filed a petition requesting the Court to appoint a guardian ad litem for the minor plaintiffs in view of their infancy, and also because these minor plaintiffs had filed a class action to represent all of the children in the community in similar situations respecting the Indianapolis schools, who were likewise infants. The District Court ruled that no guardian ad litem need be appointed for infants who present a constitutional issue to the Court. See full text of Court's ruling and reasons therefor at App. 26-28.

It is obvious from the Court's ruling, that the Court made no determination of the adequacy of the representa-

tion of these infant plaintiffs or the infants they purported to represent as a class, but rather ruled that with respect to constitutional questions, the requirements of Rule 17(c) of the Federal Rules of Civil Procedure did not apply. This Rule provides as follows:

> "*Infants or incompetent persons.* Whenever an infant or an incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. *If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.*" (Emphasis added)

It is quite clear that Rule 17(c) is not dependent upon the character of the specific claim involved in the litigation. Although Rule 17(c) does not make the appointment of a guardian ad litem for infants mandatory, it does require that the Court give careful consideration to all the circumstances of the particular case and choose between two alternatives: (1) Appoint a guardian ad litem (the usual and preferred choice); or (2) issue such order as will protect the minor. *Roberts v. Ohio Casualty Insurance Co.* (5th Cir., 1968), 256 F.2d 35, indicates a third possibility, *i.e.*, making a judicial determination of the adequacy of present representation. It held that the trial court's failure to at least make a judicial determination that the infant was adequately protected without the appointment of a guardian, was reversible error. The action involved a suit by an insurance company against minor children (and their grandmother) to set aside a workmen's compensation award of death benefits to the minor children. The trial court granted a judgment for the insurance

company, and the mother of the children, the deceased's former wife, as next friend, filed a motion to set aside the judgment on the ground that the Court had not appointed a guardian ad litem to represent the minors. From an order overruling this motion, and from the judgment setting aside the award, the children appealed. In support of its judgment reversing the Court below, the Court of Appeals pointed out that, as shown by the record, no one gave a thought to the appointment of a guardian ad litem until after judgment was rendered below; that this was apparently an oversight; that the discretion lodged in the trial judge by Rule 17(c) was not intended to apply to such a situation; and that the orderly administration of justice and the procedural protection of minors required the trial judge at least to make a factual judicial determination that the infant was already adequately protected before he might dispense with the necessity of appointing a guardian ad litem.

The Court said:

> "But the rule does not mean that a trial judge may ignore or overlook such a fundamental requirement for the protection of infants. We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the court has considered the matter and made a judicial determination that the infant is protected without a guardian. In *Till v. Hartford Accident and Indemnity Co.* (10th Cir., 1941), 124 F.2d 405, the Court found that a guardian ad litem was not necessary only because the infant was represented through a next friend, the alter-ego of a guardian ad litem. In *Zaro v. Strauss* (5th Cir., 1948), 167 F.2d 218, this Court held that an attorney's repre-

> sentation of an incompetent was insufficient to satisfy the requirements of Rule 17(c)." (256 F.2d at 39)

In the case at bar, the District Court deliberately refused to follow either of the two requirements of the Rule. It also failed to apply the third alternative minimum requirement suggested by the Fifth Circuit in *Roberts, supra, i.e.,* it made no judicial determination that the infants were protected without a guardian. Instead, the Court simply announced a revolutionary new rule of law that infants raising a constitutional question *need no protection.*

The Court believed that Rule 17(c) applied only in cases where money was involved. Yet, even on this point, the District Court's decision was in error, because the minor plaintiffs were seeking both compensatory and punitive damages. By its emphasis upon the nature of the relief sought, a factor not warranted by Rule 17(c), the Court revealed its confusion of the duty of a general guardian and a guardian ad litem. A guardian of an infant is one who legally has the care and management of the person or the estate, or both, of a child, during his minority. *28 C.J. 1058.* But a guardian ad litem is something quite different. He is appointed for the mere temporary duty of protecting the legal rights of an infant in a particular suit and his duties and his office end with that suit. He is not a party in interest in the suit and no property comes into his hands. He has no power nor duty prior to the instituting of the suit or after its determination, except perhaps for the payment of costs. *Blackwell v. Vance Trucking Co.* (E. D., S.C., 1956), 139 F.Supp. 103.

The cases cited by the Court of Appeals can be easily distinguished from the case at bar. In *Rutland v. Sikes* (E.D., S.C., 1962), 203 F.Supp. 276, the Court ruled that because the defendants (a father and his minor son) did not notify the Court of the minority of the defendant at, before or during the trial of the case and because every-

thing was done for the minor by both his father and attorneys, the motion for a new trial by a different attorney for the insurance company would be denied. In *Westcott v. United States Fidelity and Guaranty Co.* (4th Cir., 1946), 158 F.2d 20, there were three defendants, one of whom was a minor. The Court noted that prior to the day of trial no suggestion was made that a guardian ad litem be appointed. The Court held that the failure to grant a last minute motion for a guardian ad litem for the infant defendant was not reversible error because the only reason for this motion was to allow such a guardian to file an answer and demand a jury trial, though counsel for all defendants, including infant, had expressly agreed to a trial without a jury. The Court found that Rule 17(c) was substantially complied with because the Court entered an order directing another lawyer to advise the minor and to protect and defend his interest. In *Till v. Hartford Accident and Indemnity Co.* (10th Cir., 1941), 124 F.2d 405, the Court noted that the minors were represented by next friends and that there is little distinction between a next friend and a guardian ad litem.

The statement by the Court of Appeals that the defendants, having lost the case, do not have a sufficient interest to raise this issue on appeal, is remarkable in view of the fact that in *Roberts, supra,* the judgment was reversed for failure to appoint a guardian ad litem. It should be immaterial that in *Roberts,* it was the minors who sought reversal. Is it to be the rule that if 17(c) is not applied, only infant parties can seek and achieve reversal of the decision? If so, to require adults but not minors to be bound by such a decision constitutes a mockery of justice and violates the equal protection clause of the United States Constitution. It also has a profound effect on other Federal Rules of Civil Procedure such as Rule 55(b)(2), which prohibits entry of a default judgment against an infant or incompetent person by the court unless represented

in the action by a general guardian, committee, conservator, or other such representative who has appeared in the action.

In *Zaro v. Strauss* (5th Cir., 1948), 167 F.2d 218, the appellate court affirmed the setting aside of a default judgment against defendant who had been adjudged insane in another state. No jurisdiction had been obtained over her general guardian and the trial court had not appointed a guardian ad litem to protect her interest. The appellate court said the fact that defendant was represented by counsel before the default was an insufficient basis for concluding that she was "otherwise represented" and therefore, did not satisfy the requirement that a guardian ad litem be appointed for an incompetent person "not otherwise represented."

The decision that if infants raise a constitutional question, the court may ignore the mandate of Rule 17(c), if upheld, will have a profound effect upon litigation in this country. This is due to the fact that children do not have the same capacity as adults to make rational judgments and protect their own interests. It is not difficult to take advantage of and/or use infants, particularly since the taxpayers are now required to finance many lawsuits they may bring.

For reasons set forth above, this case should be reversed.

CONCLUSION

For all of the foregoing reasons, the Petitioners submit that the judgment of the Court of Appeals should be reversed, the injunction of the District Court should be vacated, and each and every Rule considered in this case, including the Board's amended Rule of prior review, should be held constitutional. In addition, Petitioners request that this Court declare the filthy language and cartoons contained in the *Corn Cob Curtain* obscene as to minors, and/or permit the Board to prohibit the distribution of this filthy, indecent material in its elementary and secondary schools even if it is not declared legally obscene as to minors.

Respectfully submitted,

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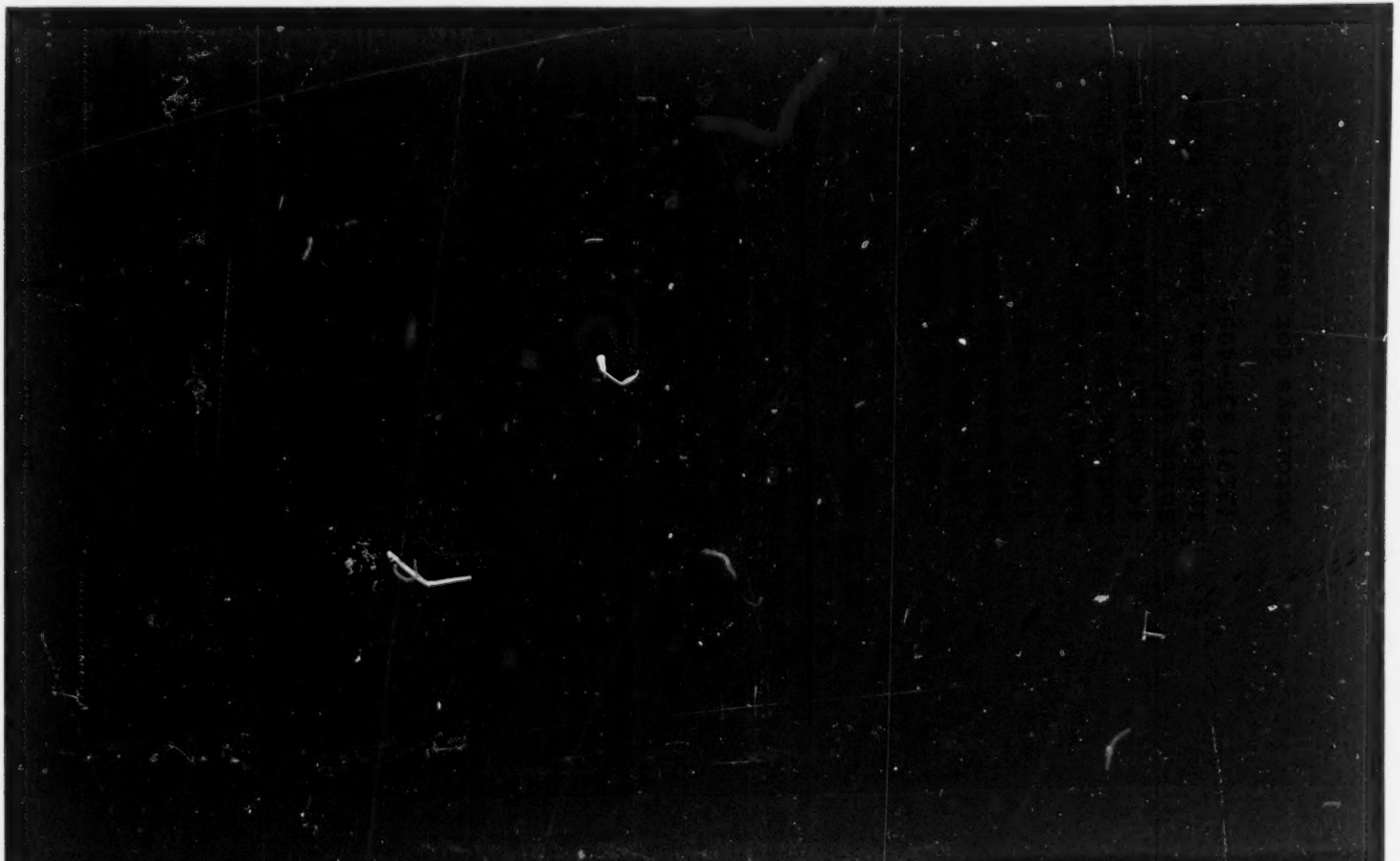

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, filed December 14, 1973, is reported at 490 F.2d 601, and is

reprinted at App. Pet. Cert. 16-31. The October 19, 1972, opinion of the United States District Court for the Southern District of Indiana is reported at 349 F.Supp. 605 and is reprinted at App. Pet. Cert. 5-15. The Findings of Fact and Conclusions of Law of the District Court is reprinted at App. Pet. Cert. 1-4.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioners.

Constitutional, Statutory and Regulatory Provisions Involved

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, Rule 17 (c) of the Federal Rules of Civil Procedure, and the applicable Rules of the Board of School Commissioners of the City of Indianapolis are set forth in the Brief for the Petitioners and in the Appendix.

Trial Rule 17 (c)(1), Indiana Rules of Trial Procedure, provides:

> (C) Infants or incompetent persons - Unborn, unknown,

and unlocated persons. An infant or incompetent person may sue or be sued in any action:

(1) in his own name;

IC 34-1-67-1(6) and (15) provide:

34-1-67-1 [2-4701]. Certain words, how construed. - In the construction of this article [34-1-1-1 - 34-1-68-1], the following rules shall be observed, when consistent with the context:

...

(6) The phrase "under legal disabilities" includes persons under the age of eighteen [18] years, or of unsound mind, or imprisoned in the state's prison, or out of the United States;

...

(15) The Terms "infant," "minor," or "person in his minority" mean any person under eighteen [18] years of age. The terms "adult," "of full age" and "person in his majority" mean any person at

least eighteen [18] years of age. [Acts 1881 (Spec.Sess.), ch. 38, §857, p. 240; 1973, P.L.313, §3, p. 1715.]

Questions Presented

The following statement of questions presented is set forth solely to clarify the issues to be adjudicated by this Court.

1. May a school board constitutionally adopt and enforce rules governing student conduct in the secondary public schools which:

a. Are vague and overbroad or which subject students to disciplinary measures for the exercise of First Amendment rights?

b. Impose significantly greater restrictions, excepting reasonable regulation of time, place and manner of distribution, upon the First Amendment rights of public secondary school students who distribute an unofficial student publication within the public secondary schools?

2. Do the First and Fourteenth Amendments prohibit a public school

board from adopting rules concerning the distribution of literature by students in its secondary schools which subject students to disciplinary measures for:

a. Solicitation of funds or sales of literature to students within the secondary schools;

b. Distribution of literature "that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others", in the absence of any explicit definitions or procedures by which a conjectural liklihood of disruption is determined;

c. Student distribution of anonymous literature or literature which is not written by a student or school employee; and

d. Distribution of literature by students in school while classes are being conducted in the school in which the distribution is to be made.

3. Whether the infrequent use,

in an unofficial student newspaper, of a few expletives and earthy words constitutes obscenity as to public high school students, and may public school authorities punish students for the use of language which appears in an unofficial student newspaper which is defined by public school authorities as filthy, vulgar and indecent?

4. Do the First and Fourteenth Amendments to the United States Constitution prevent a public school board from adopting rules which require prior approval by public school authorities of an unofficial student newspaper before distribution in the secondary schools?

5. Whether minor plaintiffs, real parties in interest in litigation challenging the constitutionality of public high school regulations which require prior unilateral administrative approval of student publications before distribution and which prohibit the sale and distribution of student publications, may sue in their own names in federal district court pursuant to Rule 17(b) and (c), Federal Rules of Civil Procedure?

Statement of the Case

During July, 1971, plaintiffs,

ublic high school students in the ndianapolis Public Schools, all of hom have since graduated,[1] met for the urpose of forming an unofficial student ewspaper entitled the "Corn Cob Cur- ain" (hereinafter referred to as "CCC") R.7, Tr. 137, 235). The "CCC" was ormed due to the uninformative and ontrolled nature of the regular high chool newspapers (Tr. 136), the name CCC" being derived by analogy to the ron Curtain - Indiana being known for orn - and the comparative lack of nformation available to those either ehind the iron or the corn cob curtain Tr. 78, Pl.Exh. 1 at p. 1).

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1 Susan Chandler and Sally Swan raduated from Thomas Carr Howe High chool and Arsenal Technical High chool, respectively, Indianapolis ublic Schools, subsequent to the filing f the "Brief For Respondents in Oppo- ition" but prior to the date on which he petition for a writ of certiorari as granted by this Court. Inasmuch s the cause proceeded as a class ction pursuant to Rule 23(a) and (b) 2), F.R.C.P., (App. 5A), and prospec- ive injunctive relief was granted by he courts below, respondents do not elieve the issues raised herein are oot, see, DeFunis v. Odegaard, -U.S.-, 0 L.Ed.2d 164, 169-170 (1974).

Five issues of the "CCC" were published by the students during the 1971-1972 public school term (R. 16-39, Exhibits "A" through "E" to Complaint, Tr. 152-153, designation changed to Pl.Exh. 1 through 5). The first four issues of the "CCC" contained poetry, opinion letters, articles on student rights, the authority of school administrators, beading, student walkouts, public aid to private schools, draft counseling, reviews of musical performances, book reviews, commentaries on censorship, student union organization, student councils, curfews, and had cartoons containing opinion commentary. (Pl.Exh. 1 through 4).

Each of the students, during the 1971-1972 public school term, assisted in the publication and distribution of the "CCC" (Jacobs Affidavit, R.52,53, Tr. 136, 139, 145, 146; Chandler Affidavit, R.54, Tr. 236, 237; Laubach Affidavit, R.56; Rood Affidavit, R.58; Swan Affidavit, R.60, Tr. 234-236; Yarbrough Affidavit, R.62, Tr. 82.), distribution having occurred on numerous occasions in the Indianapolis Public Schools (App. 28-29, Tr. 149, 240, 246, 336) as well as off school property (App. 41). The "CCC" was sold to students, faculty members and administration officials by the plaintiffs although no set price was established. In exchange for copies of the unofficial

student newspaper some students and faculty members made voluntary contributions, while other copies of the "CCC" were provided at no cost. (App.28-29, Tr. 148, 245, 341). Material submitted for publication was solicited (App.58-59) and was unedited (App. 28).

On February 9, 1972, an announcement was made over the public address system of Arsenal Technical High School to the effect that students could not "sell or solicit on school property." (Tr.241). On that same date the students were notified by the Principal of Arsenal Technical High School in a written bulletin that:

> "It is against school board rules to sell any item on school grounds without the express prior approval of the General Superintendent." (Pl.Exhibit 6, Tr.152-153)

The rule referred to in the Arsenal Tech bulletin was Chapter XI, Sections 11.05 and 11.06 of the Policies and Regulations of the Board of School Commissioners of the City of Indianapolis (Pl. Exhibit 7, Tr.241, 245, Pl. Exhibit 8, Tr.342-343). At this time Volume I, Issue 5 of the "CCC" was ready for distribution by the plaintiffs, said issue containing a brief telephone directory, letters

to the editor, articles on education, the draft, amnesty to war resisters, new academic courses, Appalachia, how West Virginia became a state, state legislative proceedings, school board meetings, the Baha'i faith, musical previews, poetry and a cartoon containing opinion commentary. (Pl. Exhibit 5)

On February 15, 1972, Jeff Jacobs spoke with then Assistant Superintendent Karl Kalp who advised him that "individual high school principals had that authority, to approve or disapprove such a publication" (App. 29, Jacobs Affidavit, R.51).

On February 16, 1972, Ray Reed, principal of Arsenal Technical High School, informed Jeff Jacobs that Karl Kalp had requested that all issues of the "CCC" be sent to Mr. Kalp. (Jacobs Affidavit, R.51, Tr.155). On February 18, 1972, plaintiffs were informed that then Assistant Superintendent Kalp had decided to ban distribution of the "CCC" (App.30, Jacobs Affidavit, R.52) because Kalp believed it to be obscene (App.30, 13-15), said determination being based upon the infrequent presence of certain earthy words and expletives (App.53-64) conveniently extrapolated from issues of the "CCC". In response to the ban against distribution of the "CCC", the

student plaintiffs voluntarily stopped distribution (A-p.30) pending resolution of the dispute by school administrators (App.7) with whom the students' negotiated from February 9, 1972, to June 1, 1972.

Contrary to the assertions of the school board (Br.Pet.7), plaintiff Jacobs did not object to the infrequent use of expletives or earthy words which were used for emphasis (App.31) or sarcasm (App.37) in the "CCC" and which Jacobs had seen in nonfiction books and novels (App.40). Further, in the context in which they appeared (App.43) such expletives and earthy words were not not found to be offensive by plaintiff Chandler (App. 40) who had read the same words in "Catcher In The Rye", "Catch-22", "The Godfather" and other books which had been given to her by her mother, a history teacher at Eastwood Junior High School in Washington Township (App.41-43), a metropolitan school district adjacent to the Indianapolis Public Schools.

From February 9, 1972, until October 19, 1973, the student plaintiffs voluntarily refrained from distributing copies of the "CCC" in, on, or about the premises of any public high school pending determination of the issues presented before the United States District Court for the Southern District

of Indiana, Indianapolis Division, the Honorable William E. Steckler, presiding trial judge, where on June 1, 1972, plaintiffs filed their class action complaint for declaratory and injunctive relief and for compensatory and punitive damages against the individual members of the Board of School Commissioners of the City of Indianapolis, the Superintendent and Administrative Assistant of the Indianapolis Public Schools, seeking an injunction against the defendant Board members and school officials enjoining the defendants from prohibiting distribution of the "CCC" in the Indianapolis Public Schools. The students also sought a declaratory judgment that Board Rules 11.05 and 11.06 violated their First and Fourteenth Amendment rights. These Rules, which required the Superintendent's prior approval before sales or solicitations or the distribution of literature would be permitted in the schools, were declared unconstitutional by the District Court after an evidentiary hearing on August 24-25, 1972. The Court on August 24, 1972, also denied Defendants' petition for appointment of guardian ad litem or next friend for Plaintiffs and all members of the class they represented.

No affirmative evidence was produced by the school board members or school officials which showed that

the prior distribution of the four "CCC" issues resulted in disruption, violence or any substantial interference with the educational processes in the Indianapolis Public Schools, nor was there any evidentiary showing that distribution of Volume I, issue 5 (Pl. Exhibit 5) would cause such results, although unilaterally alleged by Superintendent Kalp (App.44-47, 12-13).

During September, 1972, pursuant to Court order (App.1-2) the Board amended its original Rules (App.17-20) which continued imposition of prior restraints upon the plaintiffs' rights to freedom of press, speech, thought and expression. Subsequently, pursuant to the September 29, 1972, court order (App.2) directing the Board to submit additional and/or supplemental guidelines regarding the sale and distribution of student publications, the Board amended its Rule 11.05 for the second time (App.22-26) retaining prior restraints in violation of the plaintiffs' First Amendment rights.

On October 19, 1972, the Court entered a permanent injunction against the Defendants, setting out certain conditions for Board rules and declared amended Rule 11.06 and five sections of amended Rule 11.05 unconstitutional, since which date the plaintiffs have

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ished, distributed and sold, or
eived voluntary contributions for
issues of Volume II of the "CCC"
for issues of Volume III. On
mber 9, 1972, Defendants filed a
ce of appeal to the United States
t of Appeals for the Seventh Cir-
from the judgment and order of
ber 19, 1972. The Court of Appeals
rmed the decision of the District
t, Judge Christensen dissenting in
, on December 14, 1973.

On March 5, 1974, the Board filed
tition for Writ of Certiorari to
United States Court of Appeals for
Seventh Circuit and on June 3, 1974,
Court granted the writ.

SUMMARY OF ARGUMENT

I

A. The First Amendment protects
expressive activities of public
school students. Tinker v. Des
es Community School Dist., 393
03 (1969). Our national policy
rs freedom of expression and op-
s censorship. The concepts of
ueness" and "overbreadth" have
applied in both civil and crim-
proceedings which reviewed stat-
, ordinances, administrative reg-

ulations, temporary restraining orders, and oral directives. No compelling reasons of policy or authority require significantly different results in the application of the First Amendment to expression by students in a non-official newspaper than to other kinds of fact situations in which other arms of the State seek to suppress expression.

B. The freedom of public high school students to distribute printed matter is clearly established. While the "special characteristics" of the school environment necessarily affect the Application of the First Amendment rights, restrictions of those rights by public school officials must be founded upon more than undifferentiated fear or the apprehension of disturbance. Far from dictating less free expression than is found in the community at large, our public high schools are peculiarly the marketplace of ideas. Student expression is therefore to be emphatically encouraged rather than suppressed. Whatever may ultimately be regarded as a definitive theory of the goal of public education, its purposes should not be viewed as opposed to the encouragement of student expression.

II

A. 1. The "CCC" was not a commercial publication circulated for rofit. The freedom to circulate publications is as essential to freedom f the press as is the freedom to publish. The Board rules regulating tudent publications circulated in xchange for a set price or voluntary ontributions effectively create a ban gainst public high school non-official ublications because operating expenses, ven in such a modest enterprise, could ot entirely be met by the student publishers.

2. The Board's blanket prohiitions of all sales of non-official tudent publications is not a constituionally valid regulation of "time, lace, and manner of distribution." No vidence appears in the record of these roceedings showing material or subtantial disruption of the work and disipline at the Board's high schools reulting from the circulation of "CCC" or free or for voluntary contributions. he protection of First Amendment rights emands more than mere "reasonableness" n public high school regulations.

B. The Board's rule which requires igh school students to determine, witht guidelines or definitions of any

kind, what literature would be "likely to disrupt" is vague and overboard under the First Amendment. Similarly, a rule which requires students to predict, without guidance of any kind, what literature would cause "injury to others" is vague and overboard.

C. 1. The Board's rule prohibiting the distribution of any literature not written by students or employees of the Board is an unconstitutional prior restraint through content control of literature produced by public high school students.

2. The Board's rule requiring the name of the author of any distributed literature is an unconstitutional interference with the well recognized right of anonymity in publications protected by the First Amendment. No evidentiary showing has been made which requires a ban on anonymity thereby creating a double standard between high school non-official publications and general circulated newspapers, magazines, and other publications.

D. 1. No evidence has been introduced by the Board which justifies a ban against any non-official literature distribution in any high school merely because one or more classes are in session somewhere within that school.

2. The Board's "any classes rule" goes beyond any decision on reasonable "time, place, and manner" regulations and can be tantamount to an effective ban against all distribution of high school student non-official publications.

III

1. The Board has presented an anticipatory constitutional question with respect to the usage of "filthy, vulgar, and indecent" language since the Board has no rules on the usage of language except for one which prohibits literature "obscene as to minors."

2. This litigation has not involved distribution of "CCC" to minors at any time or under any circumstances.

3. The "CCC" is not "Obscene as to minors". The Board's "adapted" version of the tests propounded in Miller v. California, 413 US 15 (1973) has not been promulgated in any regulation or orally applied to the "CCC" in these proceedings. The usage of "earthy words" in "CCC" is exclusively for emphasis or humor, and the publication does not have erotic content or otherwise appeal to prurient in-

terests. The expulsion of students or the censorship of non-official publications for the mere use of "earthy words" - in the absence of reasonable "time, place, and manner" regulations, actual disruptions, or other constitutionally permissible considerations - creates an impermissible double standard between high school non-official publications and magazines, dictationaries, novels, and other literary materials commonly found in all public high schools. Offenses to "sensibilities" in the absence of genuine disruption or likelihood of disruption, fighting, or other significant and measurable harm (and in the absence of any limiting or defining regulations concerning the concept of "sensibilities") may not constitutionally serve as the basis for suppressing First Amendment rights which involve the infrequent use of "earthy words."

IV

A. The Board is seeking review of prior approval rules which were superceded by other rules promulgated by the Board itself. The Board again has presented an anticipatory question and, furthermore, has asked the Court to select from among various possible

rules and write those rules for application retroactively to the facts of this case.

V

The District Court's determination that minor and former minor respondents in these proceedings require no guardian ad litem was in accordance with Indiana procedure and founded upon a correct finding that no inadequacies of representation or prejudice resulted to any of the respondents in the litigation.

ARGUMENT I

A.

The Standards of "Vagueness" and "Overbreath" Which Limit the Board's Power to Regulate Student Publications Do Not Differ Significantly from the Standards Applied in First Amendment Criminal Cases.

The standards or tests applied in First Amendment cases under the labels "vagueness" and "overbreadth" have been employed in both civil and criminal contexts. E.g. Connally v. General Construction Co., 269 US

385 (1926); Lanzetta v. New Jersey, 306 US 151 (1939) The essential qualities of these tests of standards have been stated in various ways, including holdings that "the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" Shelton v. Tucker, 364 US 479 (1960), quoted in Carroll v. Commissioners of Princess Anne, 393 US 175 at 183-184 (1968). This Court has recognized that the concept of vagueness can be applied to civil scheme of censorship even though it is at a classification rather than direct suppression stage. Interstate Circuit v. Dallas, 390 US 676, 688-689 (1968). The Obscenity Cases decided in June of 1973 included one case involving civil declaratory and injunctive claims as opposed to a criminal prosecution, Paris Adult Theater I v. Slaton, 413 US 49 (1973). That case was decided on the same grounds as were those involving criminal prosecutions (e.g. Miller v. California, ___ US ___, 37 L.Ed.2d 419 (1973)), and in the face of dissents arguing that the actions taken were both vague and overbroad. First Amendment standards and tests have long been applied to the regulations and procedures of public schools. Se e.g. West Virginia State Board of Education v. Barnette, 319 US 624 (1943).

In the last decade, this Court gave increased attention to the application of First Amendment principles in both high school and university settings. Cases involving high schools and universities reached a variety of results on First Amendment questions. The policy which runs consistently through those cases, and which continues to date, is that our "state-operated shcools may not be enclaves of totalitarianism." Tinker v. Des Moines Community School Dist.,393 US 503, 511 (1969). Although the Board's brief alludes throughout its pages to the pursuit of "valid educational goals (e.g. Br. Pet. 8)," it offers virtually no specifications concerning such goals. It is, hopefully, still clear that the goals may not constitutionally be calculated to "foster a homogeneous people." Meyer v. Nebraska, 262 US 390, 402 (1923). We have been assured that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker, supra, at 505.

Although the Board claims that the judiciary, (and, presumably this Court,) "lacks expertise and training in the problems of operating public schools (Br. Pet. 9)," the Court has nonetheless been able to evaluate such integral parts of traditional education as curriculum offerings. Meyer, supra,

Bartels v. Iowa, 262 US 404 (1923), Pierce v. Society of Sisters, 268 US 510 (1925). The Court has found First Amendment protection for the criticisms of teachers and administrators within public educational systems. Keyishian v. Board of Regents, 385 US 589 (1967); Pickering v. Board of Education, 391 US 563 (1968). It has been observed, in the context of a case involving a public school teacher, that this Court has held that an opportunity for a fair adversary hearing must precede State action which would directly impinge upon interests of free speech or free press - even if the interest is not clearly protected under substantive First Amendment standards. Board of Regents v. Roth, 408 US 564, 575, ft. nt. 14 (1972).

This Court has continued to strongly affirm our national commitment to free expression and our national opposition to censorship; it has continued to be able to distinguish between claims of alleged disruptions of schools and the reality of First Amendment repressions which those claims represented. Police Department of Chicago v. Mosley, 408 US 92 (1972). Tinker, supra, has been reaffirmed as a "touchstone" which "made clear that school property may not be declared off limits for expressive activity by students..." Grayned v.

City of Rockford, 408 US 104 (1972). Distinguishing Adderley v. Florida, 385 US 39 (1966), the Court recognized Tinker's observation that "a school is not like a hospital or a jail enclosure." Tinker, supra, 393 US at 512, ft.nt.6, quoted at Grayned, supra, at 121 ft.nt 49.

The Board's argument concerning the alleged equating by the Seventh Circuit Court of Appeals of civil and criminal vagueness and overbreadth First Amendment tests does not, and should not, dispose of the lower court's decision concerning the Board's rules. This Court's continuing scrutiny of State attempts to curtail First Amendment rights does not lessen when the attempted suppression comes in an exclusively civil context - including protection for the advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Communist Party of Indiana v. Whitcomb, US , 38 L.ed. d 635 at 642 (1974). Whether or not the Seventh Circuit is the only one in which it has been held that school regulations must be equated to criminal statutes, Br. Pet. 19)," it is clear that the Seventh is not the only Circuit to apply the First Amendment standards and tests utilized by the Court below in this case. The First Circuit, for example, in Riseman

. School Committee of City of Quincy, 39 F.2d 148-150 (1st Cir. 1971) held hat while a school may devise sensible ules governing the time, place and anner of distribution of literature, it ould not constitutionally prohibit istribution of literature through the nforcement of vague rules. While Tinker tself did not speak in terms of agueness and overbreadth, it nonetheless tands for the proposition that public chool authorities must restrict First mendment rights, if at all, in the most arrow and least restrictive fashion ossible under the circumstances. Relying pon Tinker and our heritage of First mendment cases, this Court recently ffirmed its belief that the "vigilant rotection of constitutional freedoms is owhere more vital than in the community f American Schools." Shelton v. Tucker, 64 US 479, 487 (1960) quoted in Healy v. ames, 408 US 169, 180 (1972). Recog- izing Mr. Justice Rehnquist's obser- ations in Healy, supra, at 202-203, it hould be kept in mind that the facts of he instant case require more serious anctions than abandonment of a "plan to eet in the college coffee shop." The oard is simultaneously asking this Court o reverse the Seventh Circuit and permit chool authorities both prior censorship and a set of regulations which will have he net effect of destroying any non- fficial student publications.

Regardless of the terminology employed, the First Amendment policy which the Board wishes this Court to approve is diametrically opposed to its holding that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." Tinker, 393 US at 511. Indeed, it appears that the only way to accept the Board's position is through implicit or explicit overruling of Tinker. The Board candidly has argued that "since one function of elementary and even secondary education is indoctrinative - to transmit to succeeding generations the body of knowledge and set of values shared by members of the community - some measure of public regulation of classroom speech is inherent in the very provision of public education." (Br. Pet. 26). In the area of literature distribution, the entire thrust of the Board's position is, indeed, that its students should receive only that literature which it chooses to permit to be communicated. The indoctrinative approach requires "closed-circuit recipients."

The Board has contended that three reasons indicate why "criminal standards and processes" employed in the context of our criminal law should not be utilized in the academic community. (Br. Pet. 21). The reasons are as follows: (1) "Criminal law is designed for circumstances and ends

unrelated to the academic community"; (2) "It would frustrate the teaching process and render institutional disciplinary control impotent" if educators were required to utilize the "intricate, time-consuming, sophisticated rules, standards, procedures, or safeguards of criminal law"; and (3) "the reasons for which students may be lawfully disciplined or suspended from school are limited only by the varieties of misbehavior which their ingenuity can devise," and "therefore necessitate the use of encompassing words in conduct codes." (Br. Pet. 21).

A preliminary observation in response to these arguments is appropriate. Absolutely nothing has occurred in the course of this litigation to date which has resulted in the imposition on the Board of any "procedures" or "safeguards" of the variety found in criminal law. This litigation has not involved Due Process rights to fair hearings, notices, or any of the other procedural requirements which are familiar in the context of criminal law. It is also quite important to note that the statute cited on the page following the above quoted reasons (Br. Pet. 22), Ind. Ann. Stat. §28-5358, et seq., IC 1971 20-8.1-5-1 provides for an extremely elaborate procedural scheme which specifies limitations upon schools within which they may create additional regulations, provides grounds

for the expulsion of students, grounds for the exclusion and short term suspension of students, cites other disciplinary remedies, provides for certified or personal delivery of written recommendations and proposals by way of notice, the selection of impartial hearing examiners within carefully specified time limitations, rights of representation by counsel, cross-examination and the making of a permanent record of the proceedings, and it details an appellate procedure involving hearing committees, the board of the particular school corporation, and resort to the courts. Affirmance of the Seventh Circuit in these proceedings will in no way modify the procedural requirements with which the Board must already comply pursuant to state legislation, not court imposition. It should also be noted parenthetically that the civil proceedings utilized in adjudications of juvenile delinquency have, despite the complex objectives of the juvenile court, been subjected to many of the procedures and safeguards of criminal process. In re Gault, 387 US 1 (1967).

It is, therefore, clear that whatever differences might exist between the criminal law and the environment of public high schools, the State of Indiana has already seen fit to impose the kinds of procedures which the Board wishes to avoid, while nothing in this case will

affect the imposition of such procedures in any way. The first two reasons cited above by the Board therefore have no practical value in assessing the First Amendment questions in this case. The last reason - "the varieties of misbehavior which their ingenuity can devise" - is also effectively rebutted by the Indiana school disciplinary statute. In Ind. Ann. Stat. §28-5390c IC 1971 20-8.1-5-4, 12 subsections (themselves often containing numerous additional subdivisions) carefully outline the types of student conduct which shall constitute grounds for expulsion. The legislation constitutes a well-drafted enumeration of grounds which quite adequately cover the field. It must also be stressed, however, that this case is not about a wide spectrum of student misbehavior. We are here solely concerned with the distribution of a non-official student publication. The twin facts that the State of Indiana has successfully enumerated student conduct subjectable to sanctions, and the fact that we are only here concerned with one particular kind of conduct, both show that the reasons advanced by the Board for differentiating between criminal and civil standards in a First Amendment context failed to show any compelling reasons for reversing the courts below.

B.

1. Schools May Not Generally Prohibit Distribution of Non-Official Student Publications.

Chief Judge Steckler enunciated the basic point at which analysis of this question must begin: "No right is more clearly within the protection of the First Amendment, whose provisions Tinker v. Des Moines Independent Community School Dist., [citations omitted] has now extended to the public school, than the freedom to distribute printed matter." Jacobs v. Board of School Com'rs of City of Indpls., 349 F.Supp. 605, 609 (1972). The Board has recognized the validity of this holding, to an extent, in its rule 1.4 which exhorts school officials to "take care to insure that the constitutional and other legal rights of students to express themselves freely shall not be infringed." It therefore seems that our first point of analysis is not open to question - public high school students do indeed enjoy First Amendment protection which public schools may not subject to a general prohibition of non-official student publications.

2. The Special Characteristics of the School Environment Affect Student First Amendment Rights.

Plaintiffs have consistently recognized throughout this litigation the existence of legitimate considerations applicable to the school environment which make it differ from other environments. Tinker makes it clear that First Amendment rights are "applied in light of the special characteristics of the school environment..." Tinker, 393 US at 506. In the instant proceedings, for example, the District Court, in light of Fujishima v. Bd. of Education, 460 F.2d 1355 (7th Cir. 1972), recognized that a school district may lawfully establish a rule punishing students who publish and distribute on school grounds material which is obscene or libelous. Jacobs, 349 F.Supp. at 609. Plaintiffs have never challenged that proposition, nor have they ever argued for the proposition that the school was identical to the environment in other areas of the community.

The question which we face is not, therefore, whether the Board may constitutionally impose any restrictions on the First Amendment rights of its high school students. Rather, the genuine question is as follows: In support of its various rules concerning publications, what facts, what evidence has been shown by the Board that establishes "that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness

that always accompany an unpopular viewpoint...and...showing that engaging in ...the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school ..." Tinker, 393 U.S. at 509.

Plaintiffs believe that the Board has provided no facts which justify its various rules in the course of these proceedings, and its arguments show with equal clarity that it can offer at the very most only "undifferentiated fear or apprehension of disturbance..." Tinker, 393 U.S. at 508. In addition to the arguments under Section A above, we will now examine other reasons advanced by the Board in light of two general observations concerning their argument as a whole.

a. The Special Characteristics of the School Environment Require Greater Exercise of First Amendment Rights Than Many Environments in the Community at Large.

The thrust of the Board's argument distinguishing the high school environment from that of the community at large is all in one direction: greater repression of high school students'

First Amendment rights than would be tolerable for adults in the community at large. The Board has failed to recognize that in many instances, the school environment requires even more vigorous exercise of First Amendment rights than is permitted by adults in certain instances outside of the public high school. As we previously observed, Tinker recognized that a school is not like a hospital or a jail enclosure, and that accordingly it involved greater measures of expression. Tinker, 393 U.S. 512, ft. nt. 6. We submit emphatically that it is also not like the United States Army. Yet, not even the military can prevent First Amendment activity under all circumstances. Flower v. United States, 407 U.S. 197 (1972). If the Board's position is correct that there is a valid analogy between the principles applied in Parker v. Levy, U.S. , 41 L.Ed. 2d 439 (1974), (No. 73-206) and the facts of this case, they are clearly arguing that Tinker must be overruled. Tinker tells us that the "classroom is peculiarly the 'marketplace of ideas.'" Tinker, 393 U.S. at 512. Parker tells us that the Army "'is an executive arm' whose 'law is that of obedience.'" Parker, 42 L.W. at 4982, 4985 quoting In re Grimley, 137 U.S. 147, 153 (1890). And, the Board has submitted that this Court must assist it in prohibiting "students from turning the schoolhouse

into a literal marketplace..." (Br.Pet. 14).

The model of high school education which emerges from its brief is clearly one of obedience by students who are permitted only to engage in "supervised and ordained discussion in a school classroom." Tinker, 393 U.S. at 513.

It is significant that Tinker and Parker both grew out of reactions to the Vietnam War. In Tinker, black armbands were worn to exhibit opposition to our involvement in the war. Tinker, 393 U.S. at 510-511. In Parker, the court martialed captain's language and behavior were in opposition to the war. Parker, 42 L.W. at 4980-4981. The results in the two cases, however, are strikingly dissimilar.

b. Public High School Involves More Than the Development of Intellectual or Vocational Capacities of Students.

The Board's view of public high school education is not to be found in any particular location in its brief. We have commented above about the "indoctrinative" aspects of their view, but an additional aspect is to be found in

the statement that students are brought together "for the purpose of developing their intellectual or vocational capacities, which effort is distasteful to many and resisted by some." (Br.Pet. 23-24.) We submit that public high school education is considerably more than the sum of social indoctrination and development of intellectual or vocational capacities. Tinker found that "personal intercommunication among the students [citations and footnote omitted]" was a significant activity which could occur in the cafeteria, on the playing field, or on the campus during authorized hours. Tinker, 393 U.S. at 512-513. The Court there relied upon the concept that our nation's leaders need to be trained through wide exposure to a robust exchange of ideas which discovers truth "out of a multitude of tongue, [rather] than through any kind of authoritative selection." Tinker, 393 U.S. at 512 quoting Shelton v. Tucker, 364 U.S. 479 at 487 (1960).

Perhaps the most searching examination of the purposes of public education undertaken by this Court was that in San Antonio School District v. Rodriquez, 411 U.S. 1 (1973). The Court found that education presents a myriad of "intractable economic, social, and even philosophical problems." Rodriquez, 411 U.S. at 42 quoting Dandridge v. Williams, 397 U.S. 471 at 487 (1970).

Most significantly, the Court made the following observation: "Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. [footnote omitted]" Rodriquez, 411 U.S. at 43. This Court need not commit itself to any particular view of the goals of public education to decide this case, but it would be especially damaging to the future of public education if it were to accept the constricted model offered by the Board.

c. The Board Has Failed to Show More Than an Undifferentiated Fear or Apprehension of Disturbance.

Plaintiffs voluntarily ceased distribution of their non-official student publication after they first learned of the existence of the Board rules which led to the institution of these proceedings. At the time they took it upon themselves to determine what was required of them under school rules, they had distributed four issues in toto, and they were beginning to distribute the fifth. When they voluntarily terminated distribution, no school official or teacher had requested that they stop distributing the publication, nor

had any of them been subjected to disciplinary sanctions for such distribution. The record shows no disturbance of any kind at any public school at any time during which the CCC was distributed. The facts in this case show even less justification for the Board rules in question than the facts in Tinker showed for the actions there taken by school officials. Indeed, at the time of the promulgation of all of the Board rules currently before this Court, plaintiffs were continuing to voluntarily refrain from distributing their publication. Each of the rules now in question was adopted in a relative vacuum, and not in response to any behavior by the plaintiffs except for the institution of this litigation. Cf., Rule adoption in Sullivan v. Huston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973).

Of singular interest is the fact that the Board relies upon "vivid imagination" and two lower court cases which held that the absence of actual disturbance to the schools in question was immaterial. (Br.Pet. 39-40). One of those two cases upon which the Board has relied, Cloak v. Cody, 326 F.Supp. 391 (N.D.N.C. 1971), was vacated and dismissed as moot. Cloak v. Cody, 449 F.2d 481 (4th Cir. 1971). The other case, Katz v. McAulay, 438 F.2d 1058 (2nd Cir. 1971), cert. den., 405 U.S.

933 (1972), involved a solicitation of funds to pay for legal fees and transcripts on behalf of eight defendants who were on trial in federal court. The solicitation, therefore, was not for the incidental expenses incurred in publishing a non-official student newspaper. Rather, it was a solicitation for money contributions to an outside organization, and evidence was received in the case indicating that from seventy-five to one hundred requests to use school property for the solicitation of funds had been denied over a period of a dozen years by the school in question. The one page leaflet the students distributed in that case was essentially a solicitation for money contributions, and it was clearly not comparable to the CCC as a student newspaper.

The Board's reliance upon Katz and Cody is, to reiterate, an implicit admission of the lack of evidence of disruption of any kind in the instant case. In the absence of such evidence, the Board has alleged various harms throughout its brief which allegedly might result from permitting the distribution of a publication such as the CCC. They should not be permitted, however, to gloss over the fact that none of the alleged harms could be demonstrated despite distribution of the publication over a period of almost one year. In spite of that unavoidable

fact, the Board has alleged the following, speculative problems which they allege result whenever a publication such as CCC is permitted to be distributed in public high schools:

1. "If any student is disciplined for flagrant violation of a Board rule or wishes to challenge a Board rule, then under the Court's method of review of the regulation, if the student or Court could suggest hypothetical impermissible applications of the rule, it would be declared void on its face and the student could escape any punishment even if his own conduct was not privileged or protected." (Br.Pet. 9)

2. "Schools also have an interest in protecting the safety and well-being of its students and in identifying students who abuse their freedoms and harm others through the use of fraud, libel and obscenity." (Br.Pet. 13) "To prohibit students from turning the schoolhouse into a literal marketplace; to prohibit them from delaying or disrupting classwork by forbidding distribution while classes are in session which all are required to attend; to prohibit significant distuptions; to prohibit students from becoming the tools of outsiders who seek to reach a vulnerable captive audience in schools; to prohibit anonymity so that those responsible for abuses may be identified

..." (Br.Pet. 13-14).

3. "Because students and teachers cannot easily disassociate themselves from expressions directed towards them on school property, because of the pressures upon children of multiple sales and solicitations, because students are so easily distracted from their tasks and must learn self-restraint, because disciplinary problems in such a populated and physically confining setting seriously sap the educational process and because teachers and administrators have the vital responsibility of compressing a variety of subjects and activities in a relatively confined period of time and space..."

4. "The distribution in school of the Corn Cob Curtain was prohibited because it contained obscene, filthy, indecent and defamatory language and cartoons which school officials believed were harmful to minors, and would impede and obstruct substantial educational goals."

5. "[O]ne of the basic functions of our schools is to teach children self-discipline and to express themselves properly in acceptable, civil terms..." (Br.Pet. 16).

6. "[C]hildren would lose respect for a school which tells children that

such language is improper but allows them to freely distribute it in school. Children are harmed by such inconsistencies and are also harmed by being exposed to such language at school." (Br.Pet. 16).

7. "Such language is inherently distractive and disruptive and is scarcely conducive to maintaining an academic atmosphere and a level of decency necessary for learning to take place." (Br.Pet. 16-17).

8. "It does not require a vivid imagination to visualize the type of atmosphere and discipline that would prevail in primary and secondary schools if children at school were permitted with impunity to mock and ridicule their teachers and one another, use filthy, profane or obscene language, urge others to disobey their teachers, school rules, or the law, conduct commercial activities, and anonymously write falsehoods, thereby causing a delay of schoolwork, distractions, disruptions, or violence." (Br. Pet. 26.).

9. "If the Board rules are held unconstitutional by this Court, the elementary and secondary schools will not be able to maintain even a basic level of decency, order and discipline necessary to obtain the academic atmosphere essential for learning." (Br.

Pet. 26).

The quotations above are a sample of common themes found in the Board's brief. It must again be stressed that almost none of them is founded upon any evidentiary showing of any kind, including even the abstract comments of Dr. Karl Kalp who offered his personal opinions which were of the most speculative and general variety imagineable. (App. 43 et seq.).

Several additional responses are appropriate to demonstrate that the nine quotations above do not constitute reasons why this Court should reverse those below. In addition to presenting a parody of the judicial process, the first quoted reason above fails to recognize that these proceedings do not involve general principles which would support flagrant violations of board rules. These proceedings involve a fundamental First Amendment right, and while plaintiffs do not accept the suggestion that "hypothetical impermissible applications" of rules have been involved in these proceedings, it is clear that hypothetical applications can be appropriate in First Amendment decisions. See, e.g. Gooding v. Wilson, 405 U.S. 518 (1972), Coates v. City of Cincinnati, 402 U.S. 611 (1971).

The second quotation above is

one out of three formulations alleging a variety of dire results unless the Board position is accepted. The other formulations are found in the third and eighth passages quoted above. It cannot be too strongly stressed that none of the dire consequences has apparently befallen the Board in the nearly two years since it was enjoined from enforcing the rules in question. The Board has not sought the opportunity to provide a supplementary evidentiary showing. It has not sought to modify the District Court's order despite a clear invitation to do so by the Seventh Circuit. Plaintiffs' contention in this regard should not be brushed lightly aside. The Board should be required to substantiate in some reasonable fashion its forecasts of extreme and serious consequences flowing from the distribution of CCC.

The Board should also be called to account for the rather casual usage of allegations against the plaintiffs which find no support of any kind in the evidence. There exists, for example, the clear implication in the second quoted passage above that some evidence involving "the use of fraud" can be found in these proceedings. There is the suggestion of "delaying or disrupting classwork" with no evidence to support it. There is a continuing intimation that the plaintiffs are responsible for libel, or "false-

hoods," but it should be noted that argument on that subject has been almost totally dropped at this stage of the proceedings. There are allegations of "students...becoming the tools of outsiders..." without any supporting evidence.

In the third quoted passage above, one comment particularly requires a response. We are told that students "must learn self-restraint", but we are led to conclude that they can only do so by being shielded from publications such as CCC. It is self-evident that people do not learn self-discipline in an environment in which all of their choices are controlled for them by others.

The fourth quoted section above shows the lack of evidence in these proceedings because it admits that the reason distribution of CCC was prohibited was because "school officials believed [it was] harmful to minors, and would impede and obstruct substantial educational goals." The only school official who apparently held such a belief, however, was Superintendent Kalp who discussed the matter entirely in retrospect. Mr. Wally Potter, an administrator at one of the Indianapolis high schools, had the opportunity to suppress the publication long before the students

voluntarily terminated distribution, but he was of the opinion that school interests were better served by not taking such action. (App. 52).

The sixth and seventh quoted passages above, if accepted, would place public relations above the First Amendment. Once again, there is no evidence of any kind that children were harmed by the publication, that they would be harmed "by such inconsistencies" as would theoretically result from teaching certain kinds of communication while students were permitted to distribute communications of their own which differed only in the utilization of a handful of words. It should be added that the Board also argued that a correlative reason for action by this Court is that parents would also lose respect for a school in which a publication such as CCC was permitted to be distributed. (Br.Pet. 16). All of these alleged reasons are apparently founded upon remarks by Dr. Kalp. Those remarks, it should be noted, were premised upon distribution of CCC with the "approval" of the administration. He also indicated that teachers and administrators had been "negatively impressed" by CCC. (App. 51-52).

The last section quoted above is basically a reiteration of many others, but the Board should be required to

emonstrate that it has not been "able o maintain even a basic level of ecency, order and discipline neces- ary to obtain the academic atmosphere ssential for learning" during the engthy period of distribution of CCC rior to this litigation, and during he two years since the Board was en- oined from enforcing the rules here n question. The burden of proof for uch extravagant claims cannot be sus- ained by the conjectural opinion estimony of Dr. Kalp.

ARGUMENT II

A.

Rules 11.06 and 11.05, Section 1.3. 1.5, Of The Policies and Regulations Of The Board Of School Commissioners Of The City Of Indianapolis, Which Prohibit The Sale, Solicitation and Receipt of Contributions By Public High School Students Who Distribute The "Corn Cob Curtain", A Student Publication, On, In Or About Public Schools, Contravene The Rights Of Public High School Students To Free- dom Of The Press, Speech, And Expres- sion.

1.

Sales and Contributions on School Property

Rules 11.06 and 11.05, Section 1.3.1.5, of the Policies and Regulations of the Board of School Commissioners of the City of Indianapolis (App. 24-26) were adopted by the Board in compliance with the district court's order of September 29, 1972 (App. 2). Reading these rules in the complete context in which they appear, it is evident that the Board is seeking to accomplish indirectly that which they cannot accomplish directly, to-wit: prohibition of the distribution and sale of the "CCC", a student publication, by the imposition of prior restraints upon the exercise of First Amendment rights possessed by the students in this action.

Relying upon Adderley v. Florida, 385 U.S. 39, 47 (1966), the Board argues that it may prohibit use of school property for non-school purposes (Br.Pet. 30). In Adderley, though, this Court upheld a conviction for "trespass with malicious intent" where the defendants conducted a demonstration on jail grounds and refused to leave when ordered by the Sheriff. The critical fact in Adderley was that the jail premises was reserved for the purpose of transporting prisoners to and from the jail and for commercial concerns

servicing the jail. This Court then held that jail premises constituted a type of public property that was subject to different rules regarding its use for First Amendment activities than are for example, parks, Hague v. CIO, 307 U.S. 496 (1939); public streets, Cox v. Louisiana, 379 U.S. 536 (1965); or state capitol grounds, Edwards v. South Carolina, 372 U.S. 229 (1963). In Grody v. State, 278 N.E.2d 280 (1972), the Supreme Court of Indiana, invalidating a statute which made it a misdemeanor for any person to refuse to leave the premises of any educational institution when requested regardless of the reason therefor, similarly distinguished Adderley, stating that:

> "From the standpoint of the latitude to be allowed in the exercise of First Amendment rights it is hard to conceive of anything more unlike a jail and its environs than a college campus. A jail is the epitome of security and regimentation while a college truly thrives only when it fosters open debate and principled dissent to the conventional wisdom of the day. The exercise of First Amendment rights is inevitably going to be an integral part of such an environment." 278 N.E.2d at 284.

While the Grody court held that "the State can by specific and narrowly

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n rules regulate the time, place,
tion and manner of use of the var-
types of school property to further
ends of education", it qualified
statement explaining that "the
attainment of those ends requires
ssured freedom to speak and publish
s and to assemble to discuss them
That freedom is gone if it exists
at the whim of certain officials."
hasis added) Id.

ontrary to the Board's assertion
public school premises were being
for the personal profit of stu-
s and for commercial purposes (Br.
30-31), no facts were presented at
l which even indirectly showed the
ization of personal profit by the
ent journalists or the presence of
mercial purpose. The cost of pub-
ng an issue of the "CCC" was esti-
l to be approximately $150 (Tr. 166)
ldition to which the "CCC" incurred
ses for rental of a post office
t $7.00 per quarter-year, for
graphy and travel (Tr. 164). In-
the "CCC" fell short of needed
, requiring personal expenditures
ontributions from the student pub-
rs to continue publication (Tr.
62). Characterizing the publica-
distribution and sale of the "CCC"
"commercial" activity in order to
fy its suppression is without
ation.

The effect of Rules 11.06 and 11.05, Section 1.3.1.5, is to limit student communication, confining expression only to those receiving approval, by prohibiting secondary school students from receiving voluntary contributions or selling the "CCC".

Decidedly the secondary school student publishers needed money to print and publish the "CCQ". The obvious source of such funds was through the sale of the publication and/or through the receipt of voluntary contributions from other public high school students either before, during or after school hours. (App. 28-29, 41; Tr. 145, 148, 341). Teachers, administrators and policemen also gave voluntary contributions for copies of the "CCC" distributed by plaintiff Chandler (Tr. 245). Without the opportunity to sell the "CCC" or to seek voluntary contributions for it from other students in the public high schools of the City of Indianapolis, secondary public school students would be prohibited from expressing their views and from fully exercising their right to freedom of the press and of speech. Thus, if the plaintiffs were merely permitted to distribute copies of the "CCC" without the related right to obtain voluntary contributions or to sell the publication, the rights of freedom of speech, press and expression would exist in principle but not

in fact. Tinker, supra, at 513.

This Court has repeatedly invalidated regulatory measures which restricted circulation of publications or which tended to destroy newspaper circulation. Grosjean v. American Press Company, 297 U.S. 233, 244, 250 (1935). "Liberty of circulating is as essential to that freedom (of the press) as liberty of publishing; indeed, without the circulation, the publication would be of little value," Lovell v. Griffin, 303 U.S. 444, 452 (1937); Ex parte Jackson, 96 U.S. 727, 733 (1917); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1930). In Near this Court found that suppression of a newspaper was accomplished by enjoining publication and that restraint was the "object and effect" of the statute under scrutiny, 283 U.S. at 712. In this case, the "object and effect" of Rules 11.06 and 11.05, Section 1.3.1.5, is to restrain and suppress sale and distribution of the "CCC". Simply because secondary public school student newspapers "are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment," Time v. Hill, 385 U.S. 374, 397 (1967) quoting Burstyn v. Wilson, 343 U.S. 495, 501-502 (1951). This Court has also stated that "(t)he right to use the press for expressing one's views is not to be

measured by the protection accorded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge," Murdock v. Pennsylvania, 319 U.S. 105, 111 (1942) for certainly freedom of speech, freedom of the press are available to all, not merely to those who can pay their own way. Id.

In Murdock the petitioners sold certain religious publications at twenty-five cents each, accepting lesser sums or even donating the publications to interested persons without funds. The same manner of sale was utilized in the case now before this Court. As in Murdock, "(i)t is a distortion of the facts of the record to describe their activities as the occupation of selling books and pamphlets," 319 U.S. at 111. Conclusively, characterization of the "CCC" as a commercial activity is unsupported by the record. Instead, the "CCC" must be acknowledged to be a legitimate exercise of freedom of the press, vitally serving the basic purposes of the First Amendment. For without an informed and free student press in the public secondary schools, there cannot be an enlightened student body. New York Times Co., supra, 403 U.S. at 713. Accordingly, the Board may not absolutely prohibit the sale, solicitation and receipt of voluntary contributions by public secondary school students who distribute

the "CCC".

2.

Substantial Justification Supportive of a Compelling Legitimate State Interest Affirmatively Established vs. mere "reasonableness"

Oversimplifying its justification for retaining the subject rules as merely being "reasonable", the Board omitted any affirmative evidentiary showing at the trial level that the receipt of voluntary contributions or funds from the sale of the "CCC" would "materially and substantially disrupt the work and discipline of the school," Tinker, supra at 513, 514. In this regard it is important to note that four (4) issues of the "CCC" were distributed in the Indianapolis public high schools for which the student publishers and distributors received monies from sales and voluntary contributions prior to the ban against distribution and sale of the fifth issue of Volume I. (Tr. 149, 244). The Board failed to establish any material or substantial disruption with the work and discipline of the public high schools as a direct result of the sale of the "CCC".

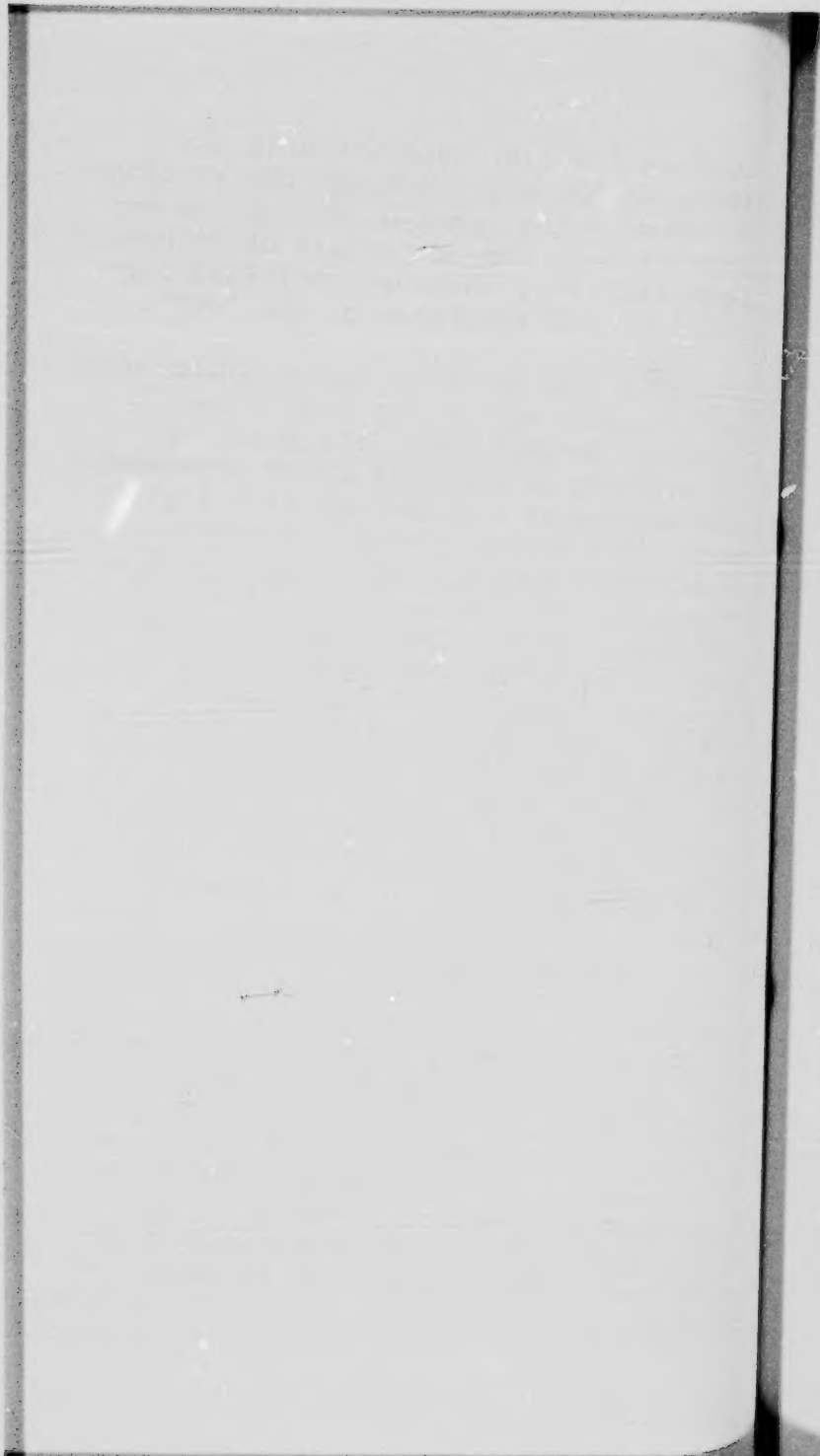
The only explanation offered by the Board for prohibiting sale of the "CCC"

or for prohibiting the receipt of voluntary contributions for the "CCC" was the testimony of Superintendent Kalp who stated salesman frequented school campuses for the purpose of selling items to either members of the faculties or to students which Kalp, in his opinion, stated should be limited as necessary for the continuing function of education (App. 43). In other words, defendant Kalp did not indicate the presence of any disturbance or disorder directly attributable to the sale and distribution of the "CCC"; in fact, Mr. Kalp relied solely upon conjecture, speculation and apprehension for his absolute prohibition against sale or distribution of the "CCC". In light of Tinker, supra at 508, such justification is insufficient to warrant suppression of First Amendment rights.

"Reasonableness" alone, as advocated by the Board, is an insufficient basis for restricting or burdening the exercise of First Amendment rights by public high school students. The breathing space required by the First Amendment requires that regulatory restrictions be narrowly drawn, Broadrick v. Oklahoma, 413 U.S. 601, 611-612 (1973) rather than impermissably overbroad (supra, Argument IA) so as to prevent a "chilling effect" on protected expression, Broadrick, supra at 630 (dissenting opinion). Rules 11.06 and 11.05,

section 1.3.1.5, substantially (in fact, absolutely) restrict the students' freedom of the press by preventing any form of sale and/or receipt of voluntary contributions, thereby precluding circulation and existence of the "CCC".

Under the guise of "maintaining order and decorum within the educational system" (Br.Pet. 31), the Board is attempting to abrogate First Amendment guarantees in the absence of a legitimate substantial compelling state interest. Tinker, supra; Antonelli v. Hammond, 308 F.Supp. 1329, 1336-1337 (D.Mass. 1970). The Board's reliance upon the district court's opinion in Cloak v. Cody, 326 F.Supp. 391 (N.D.N.C. 1971), vacated, 449 F.2d 781 (4th Cir. 1971) is misplaced as is its reference to Katz v. McAulay, 438 F.2d 1058, 1061 (2d Cir. 1971), cert. denied, 405 U.S. 933. Readily distinguishable, Katz involved solicitation by secondary school students who distributed leaflets prepared by an external nonstudent organization seeking funds for defense expenses of eight persons in a criminal proceeding. More applicable is Scoville v. Bd. of Ed. of Joliet Tp. H.S. Dist. 204, etc., 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970), which indicates, by implication, the right of public high school students to sell a student publication in a public high school. In Scoville the students had



sold 60 copies of a student publication entitled "Grass High" at Joliet Central High School for which they were expelled. Reversing the dismissal of the complaint by the district court, the appellate court found that the "Board could not have reasonably forecast that the publication and distribution of this paper to students would substantially disrupt or materially interfere with school procedures," 425 F.2d at 15, concluding that the plaintiffs were entitled to the declaratory, injunctive and damage relief sought. Simply stated, the students were permitted to continue sale of the student publication in the public high school. A similar result is compelled in the case at bar inasmuch as neither the Board nor the administrators could have reasonably forecast that the publication and distribution and sale of four (4) prior "CCC" issues of Volume I, See, Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972), would cause substantial disruption.

Conclusively, Rules 11.06 and 11.05, Section 1.3.1.5 constitute impermissible prior restraints of an overly broad nature which directly contravene plaintiffs' rights to freedom of speech, expression and press as guaranteed by the First Amendment. Organization For A Better Austin v. Keefe, 402 U.S. 415, 419 (1971); accord, Sullivan v. Houston Independent School District, 333 F.Supp.

1149, 1162 (S.D.Texas 1971) (Blanket prohibition of all sales irrespective of disruption is not a legitimate exercise of the Board's power to regulate the time, place and manner of distribution); see, Riseman v. School Committee of City of Quincy, 439 F.2d 148-150 (1st Cir. 1971) (school may devise sensible rules governing the time, place and manner of distribution of literature but may not prohibit distribution through enforcement of vague rules when applied to First Amendment activities).

Accordingly, this court should affirm the decisions below holding rules 11.06 and 11.05, Section 1.3.1.5, unconstitutional.

B.

In The Absence Of Explicit Definitions or Procedures By Which To Determine a Likelihood of Disruption, Rule 11.05, Section 1.1.1.3 Is Unconstitutionally Vague and Over-Broad.

Rule 11.05, section 1.1.1.3, (App. 23) boldly prohibits the distribution of literature "that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, func-

tions or purposes in any of the Indianapolis schools, or injury to others." Ostensibly extrapolated from terminology in Tinker, supra, although taken out of context, it is the operation and effect of the regulation which is controlling. As stated in Near, supra, 283 U.S. at 709:

> "...in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect (citations omitted)."

See, Robinson v. American Broadcasting Companies, et al., 441 F.2d 1396, 1400 (6th Cir. 1971).

The operation and effect of Section 1.1.1.3 is to subject the "CCC" to the prior review of the Board, a review which is made pursuant to a vague, overbroad prohibition regulation. Should the plaintiffs, public high school students, violate Section 1.1.1.3 they may be suspended or expelled, a severe punishment indeed but for precisely what?

While lack of precision is not itself offensive to the requirements of due process, "...the Constitution does not require impossible standards;" all

that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U.S. 1, 7, 8 (1946); accord, Roth v. United States, 354 U.S. 476, 491 (1957). The question thus becomes "...whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant." Petrillo, supra, 332 U.S. at 6.

In the case before this Court the plaintiffs would have to engage in pure conjecture and speculation to attempt to ascertain any precise meaning of that portion of Section 1.1.1.3 which reads:

> "No student shall distribute... any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce...injury to others (emphasis supplied)."

Assuming, arguendo, that the "CCC" exposed discriminatory conduct or was critical of class scheduling or substantive class content, it is readily apparent that such exposure or criticism could justifiably "injure" others. The "injury" could occur by way of official sanction or

through subtle pressures and criticisms to make changes. Indeed, the term "injury" enables the defendants to act arbitrarily without notice to the plaintiffs of exactly what "injury"[1] is prohibited. The rule applicable to such

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[1] Defined in Webster's New International Dictionary of the English Language, 1280 (2d unabr. ed. 1950)

injury

1. Damage or hurt done to or suffered by a person or thing; detriment to, or violation of, person, character, feelings, rights, property, or interests, or the value of a thing.

2. An act which damages, harms, or hurts; as an injury to the feelings; slander is an injury to the character; also, a hurt or damage sustained; as, they suffered severe injuries.

3. Abusive or offensive speech; an insult. Obs.

4. Law. An actionable wrong; that is, any violation of another's rights for which the law allows an action to recover damages or specific property, or both. Cf. TORT.

situations of indefiniteness was stated in Winters v. New York, 333 U.S. 507, 509, 510 (1948) to be:

> "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment" (citations omitted). "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

See, Grayned, supra, 408 U.S. at 108-109. Considering the fact that the content of the "CCC" or that of any other student publication may injure the feelings of others or be insulting (sometimes justifiably so) because of the unorthodox or opposing views contained in the student publication, it could be judged injurious to the emotions, egos or interests of individuals and, by the terms of Section 1.1.1.3, be prohibited from the public high schools because of the presence of an

injury." Certainly, this unjustifiable prohibition based upon a vague ule would stifle discussion as well s the free exchange of ideas and pinion,[2] leading to an unconstitutional estraint.

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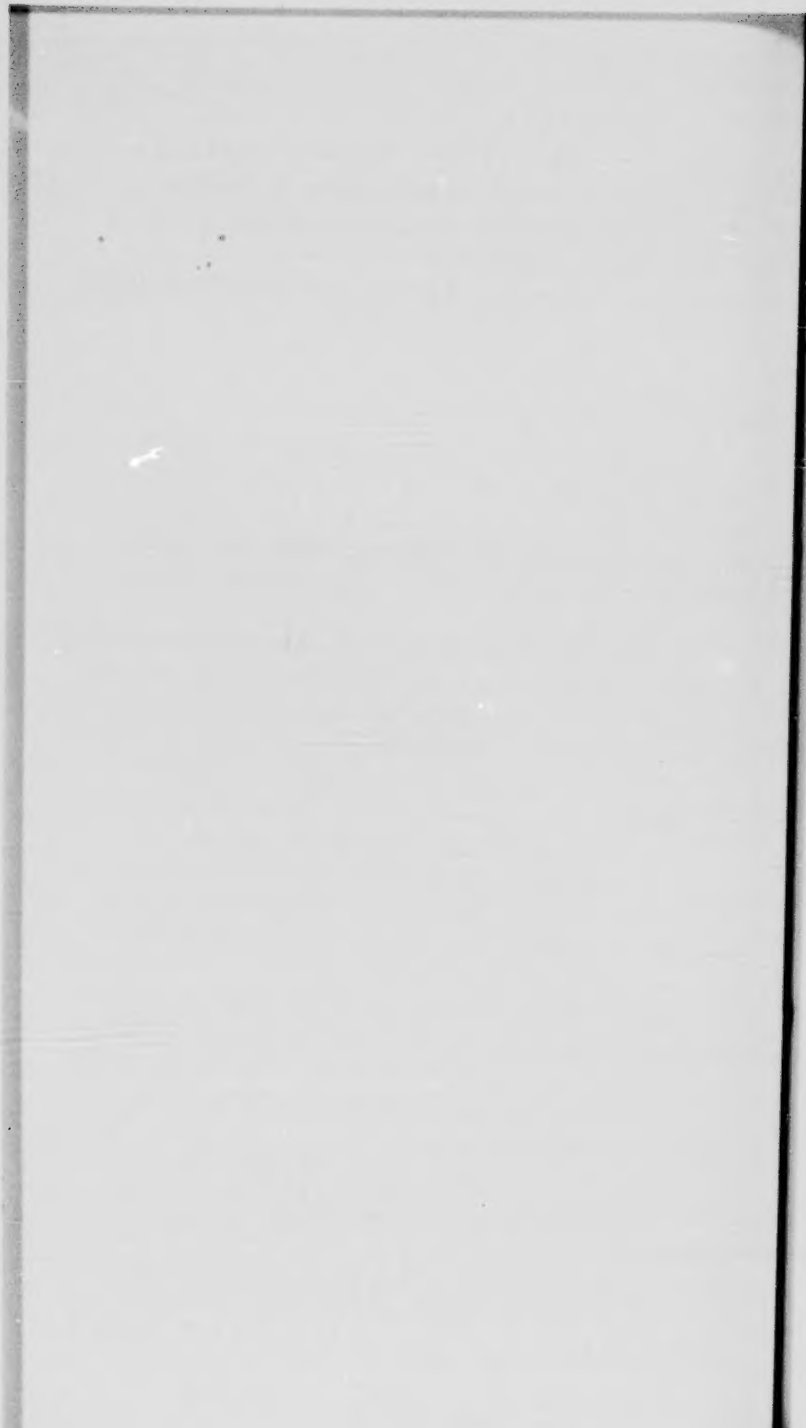
[2] Stromberg v. California, 283 U.S. 59, 369, 75 L.Ed. 1117, 1123, 51 S.Ct. 32, 73 A.L.R. 1484 (1930) emphasized he necessity of maintaining an opportunity for free political discussion:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment.

ee, Herndon v. Lowry, 301, U.S. 242, 1 L.Ed. 1066, 57 S.Ct. 732 (1936); onnally v. General Construction Co., 69 U.S. 385, 393, 70 L.Ed. 322, 329 1926).



In this case the Board completely
iled by any affirmative evidentiary
owing to justify imposition of Rule
.05, Section 1.1.1.3 as required in
oville, supra, 425 F.2d at 13, or
nker, supra. The "substantial bur-
n of justification" Crews v. Cloncs,
2 F.2d 1259, 1265 (7th Cir. 1970);
een v. Kahl, 419 F.2d 1034, 1037 (7th
r. 1969) which is required of the
ard to support the rule thus remained
satisfied. Decidedly, Rule 11.05,
ction 1.1.1.3, viewed in its operation
d effect, is an unconstitutional
ior restraint, the impermissibility
which is emphasized by its vagueness
ee Argument IA, supra) and under-
ored by the absence of substantial
stification.

The Board's assertion relating to
vil-criminal overbreadth and vague-
ss distinctions, hereinbefore dis-
ssed in Argument IA, is unmeritorious.
e divergent innumerable interpreta-
ons to which the subject rule may be
plied fails to explicitly define that
ich is "likely to disrupt"; indeed,
procedures exist to make such a
termination. Posing as an innocuous
istribution rule", section 1.1.1.3
fectively chills freedom of the press,
ppressing publication while abrogating
ndamental constitutional guarantees.
en assuming, arguendo, validity of
e rule, no evidence was introduced

to establish any substantial disruption of the educational processes, Fujishima, supra, 460 F.2d at 1358, during the time in which the "CCC" was distributed.

Scrutinized by the Court of Appeals (Pet.App. 20-22), 490 F.2d at 605-606, the rule was properly held to be vague and overbroad.

C.

Rule 11.05, Sections 1.1.1.4 And 1.3.1.6 Of The Policies And Regulations Of The Board Of School Commissioners Of The City Of Indianapolis Which Prohibit Distribution Of Student Publications In Public High Schools Which Are Not Entirely Written By Students Or School Employees And Which Further Require All Contributors To Be Named, Contravene And Violate The First Amendment Rights Of Public High School Students To Freedom Of Press, Speech And Expression.

1.

rticles May Be Written By Non-Students

Acknowledging that "(a)ny system of rior restraints of expression comes to his Court bearing a heavy presumption gainst its constitutional validity," New York Times Co. v. United States, 03 U.S. 713, 714 (1971); Bantam Books,

Inc. v. Sullivan, 372 U.S. 58, 70 (1963), it is interesting to note that Rule 11.05, Sections 1.1.1.4 and 1.3.1.6 (App. 23-24), by controlling who can write for a student publication and by requiring disclosure of the names of authors imposes impermissibly overbroad prior restraints upon the exercise of plaintiffs' First Amendment rights. Attempting to regiment and stagnate thought and expression, the Board and school officials by its Rules have sought to impose "orthodoxy over the classroom", Keyishian v. Board of Regents, 385 U.S. at 603, through "authoritative selection", if not suppression, rather than heed the admonitions that "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. at 487 (1960); which may not be enclaves of totalitarianism," Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969). Board Rule 11.05, Sections 1.1.1.4 and 1.3.1.6, which dictates to the "CCC" those who can participate in writing for the publication unconstitutionally regulates the content of the student publication by excluding articles written by nonstudents or persons other than school employees and by precluding anonymous "letters to the editor", Papish v. University of Missouri , 410 U.S. 667 (1973). No longer immune from the sweep of the First Amendment, Healy v. James, 408 U.S. 169, 180 (1972), as argued by the Board which alleges that it has

"discretion to prohibit the use of its schools for student distribution of literature written by non-students or other persons not connected with the school" (Br. Pet. 49), the Board may not, except for time, place and manner, restrict student distribution of an unofficial student newspaper because of its message, its ideas, its subject matter or its content. Police Department v. Mosley, 408 U.S. 92, 95 (1972). The Board's reliance upon Antonelli v. Hammond, 308 F. Supp. 1329, 1336-39 (D. Mass. 1970) is misplaced, expecially since that Court held that there is "no right to editorial control by administration officials" of a college sponsored and state supported newspaper while invalidating prior submission restraints upon First Amendment rights of students.

Analysis of Section 1.1.1.4, even when most liberally interpreted, reveals an overbroad, impermissible prohibition against articles written by legislators, attorneys, educators not employed by the Board, and even members of this Court, from appearing in an unofficial student newspaper. Further, the Constitution, the Bill of Rights, Acts of Congress and judicial opinions may not appear in the "CCC" for, certainly, none of these were written by students, teachers or other school employees of the Indianapolis Public Schools. Indeed, even alumni of the Indianapolis Public Schools (App. 27) are precluded from contributing literary articles to the "CCC" by reason of rules which control the

influx of information, stifle inquiry and stagnate thought, while abrogating expression of ideas: suppression of First Amendment guarantees in its most heinous, intolerable form. In Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), this Court observed that:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The guaranteed right of the people to express any thought free from government censorship and content control preserves our national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, Mosley, supra, 408 U.S. at 96, New York Times Co., supra, at 270. The Board, though, seeks to view students as "closed circuit recipients of only that which the State chooses to communicate", a concept repudiated in Tinker, supra, at 511, wherein this Court stated that students "may not be confined to the expression of those seniments that are officially approved." The inescapable result of Rule 11.05, Section 1.1.1.4 is to restrict the content of the "CCC" by prohibiting articles written by non-students. The "CCC" serves the students, not the Board, fulfilling its role as part of the free press, New

York Times, supra, 403 U.S. at 717, while asserting an "equality of status in the field of ideas," A. Meiklejohn, Political Freedom: The Constitutional Powers of The People 27 (1948), providing factual reality to the principle of free speech and expression, Tinker, supra, at 513. Decidedly, exposing students to ideas and thoughts from guest writers, prominent community members, alumni and others which may not be harmonious with those of the Board is one of the purposes of the "CCC"; in fact, of any publication. The undifferentiated, hypothetical and conjectural apprehensions of the Board and school officials, supported only by speculation, cannot justify imposition of prior restraints which chill, if not relegate to impotence, First Amendment rights. As such, Rule 11.05, Section 1.1.1.4 must be held unconstitutional.

2.

A Rule Requiring Disclosure of Publication Participants Is Invalid.

Rule 11.05, Section 1.3.1.6 (App. 24) which, of necessity, must be read in the complete context of Rule 11.05, unconstitutionally prohibits distribution of "distributable literature" (App. 23) "unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself." Initially, it must be

observed that most, if not all, daily newspapers, weekly magazines and other periodicals such as the New York Times, Washington Post, Indianapolis Star and Indianapolis News, among others, contain articles or "letters to the editor" which do not disclose the name of the author. It is incredulous that the Board seeks to impose upon the "CCC", or any other student publication, such dictatorial prior restrictions which are absent from newspapers, periodicals and magazines which are equally available to the students. The "chilling effect" on free expression feared in Dombrowski v. Pfister, 380 U.S. 479 (1965) is almost certain to occur once creative writing is imperiled, Time v. Hill, 385 U.S. 374, 398 (1967) (concurring opinion).

The Board argues that its "vulnerable captive audience" of public high school students should be shielded from advocacy or promotion of expressions of feelings with which they do not wish to contend, a concept specifically renounced in Tinker, supra, at 511; Burnside v. Byars, 363 F. 2d 744, 749 (5th Cir. 1966). Evidently, the Board is oblivious to the principle that "the constitutional guarantees of free speech and free press do not permit a state to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action", Communist Party of Indiana v. Whitcomb,

____ U.S. ___, 38 L. Ed. 2d 635, 642 (1974). Moreover, an abstract teaching or written statement concerning the moral propriety or moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A school rule or regulation, such as the one before this Court, which fails to distinguish between abstract advocacy and imminent steeling to action impermissibly intrudes upon fundamental First Amendment freedoms, sweeping within its condemnation speech, immunized from governmental control by our Constitution.[2] Brandenburg v. Ohio, 395 U.S. 444 (1969); Communist Party of Indiana, supra, at 642. Application of these fundamental principles to the case at bar compels a

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[2] This principle has been applied to statutes which directly forbid or proscribe advocacy, see, Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Yates v. United States, 354 U.S. 298 (1957), to regulatory schemes that determine eligiblity for public employment, Elfbrandt v. Russell, 384 U.S. 11 (1966); Cramp v. Board of Instruction, 368 U.S. 278 (1961), and to moral fitness justifying disbarment, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

rejection of the Board's speculative fear of advocacy, especially where no evidence was introduced at the trial which established advocacy of criminal activity (Br. Pet. 52) directed to producing imminent lawless action. Accordingly, the Board's argument in support of Rule 11.05, Section 1.3.1.6 is without merit.

Board members, school administrators and staff members, as public officials in the public secondary school setting, are constantly in the public view of students, parents and the community at large, and are often the subject of articles and editorials contained in school sponsored newspapers as well as newspapers of general circulation. As observed in Time, supra, at 388:

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."

Irrespective of the characterization of a newspaper as being one of general circulation in the community, a school sponsored paper or an unofficial student publication, a broadly defined freedom of the press assures the maintenance of our political system and an open society, including the political

and societal secondary school microcosm, Time, supra, at 389, in which students have a legitimate and substantial interest. Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-164 (1967) (Warren, C.J., concurring in result). The long-standing principle that freedom of the "press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion" must be held to encompass unofficial student publications such as the "CCC". Lovell v. Griffin, 303 U.S. 444, 452 (1937); Branzburg v. Hayes, 408 U.S. 665, 704 (1972); Mills v. Alabama, 384 U.S. 214, 219 (1966).

Although the Board argues that Section 1.3.1.6 is necessary because "anonymous persons responsible for this newspaper" are not disclosed (Br.Pet. 52), the evidence at trial (App.6,28-30) directly refutes such an assertion; in fact, review of the "CCC" (Pl. Exh. 1-5) clearly discloses the use of bylines in most articles. Compounding the illogical justification advanced by the Board is its claim of vicarious tort liability for libel for a publication having no school financial or administrative support, and therefore no reasonable basis upon which to premise liability, if any exists. Most alarming, though, is the Board's

misleading statement that "the Rule does not impose any prior restraints and places no restrictions upon what can be said, where it can be said or when it can be said" (Br. Pet. 52). Scrutiny of Rule 11.05, which must be read in its entirety, discloses a vague, overbroad, impermissible definition of "distributable literature" (Argument I, supra), which regulates distribution as to time in an unspecified, overbroad manner in Section 1.1.1.3, prohibits content by restricting outside authors in Section 1.1.1.4, and effectively precludes distribution by prohibiting either sale or receipt of voluntary contributions in Section 1.3.1.5 (Argument 2a, supra).

Failure to strictly comply with Section 1.3.1.6 may result in suspension or expulsion (App. 25), unduly chilling the exercise of First Amendment rights. For example, all student contributors can be expelled if one name is omitted in printing; if one person invokes a right to anonymity which is accorded respect and recognition; if only one contributing organization refuses to be named. The spectre of administrative abuse by school officials of Section 1.3.1.6 cannot be ignored.

As occurred in Talley v. California, 362 U.S. 60 (1960), the Board here seeks to penalize students for distri-

bution of a student publication in the secondary schools that does not have the names of participants disclosed. In Talley this Court stated:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression....Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names." 362 U.S. at 64-65.

Protection of the anonymity of publishers, printers, and distributors of newspapers is an integral, essential, imperative part of our freedom of the press, Bursey v. United States, 466 F. 2d 1059, 1085 (9th Cir. 1972), a press which serves the governed, not the governors, New York Times Co. v. United States, 403 U.S. 713, 717 (1971).

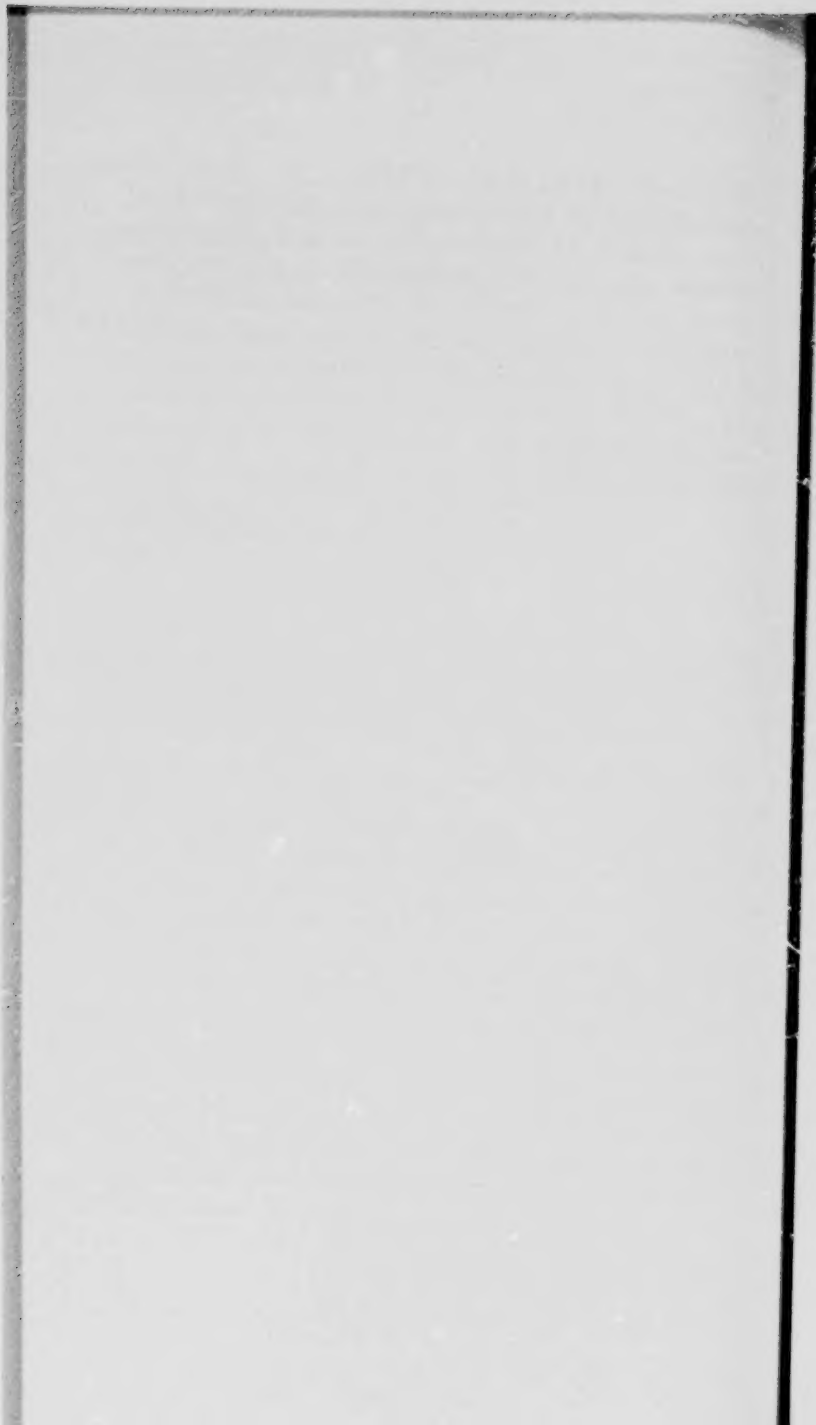
Just as compulsory disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint upon the freedom of association, N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1957); Bates v. Little Rock,

361 U.S. 516, 523 (1960), so, too, does the Board's disclosure requirement of the names of individuals and organizations who participate in the publication of the "CCC" chill the students' rights to freedom of press and association. To preserve fundamental constitutional guarantees of public secondary school students, Section 1.3.1.6 must be invalidated.

D.

The "Any Classes Rule" Is An Overbroad "Time, Place and Manner" Regulation Which Could Operate as a Ban on All Nonofficial Student Publications.

Each of the courts below has found Section 1.3.1.1 of amended Rule 11.05 unconstitutionally overbroad. The rule states that "(N)o distributable literature shall be distributed by any student in any school while classes are being conducted in the school in which the distribution is to be made." (Hereinafter the "any classes rule") The two major attacks by the Board upon the decisions below with respect to the "any classes rule" fail to show any reason justifying reversal of the two courts' findings.



The Board's Arguments Concerning Class Arrangements and Schedules Assume Evidence Which Was Not Introduced and For Which the Board Bore the Burden of Proof.

The Board is claiming for this Court that the "places of ... classes are obviously all throughout the school." (Br. Pet. 55). No citations to the record are given in support of that statement because none exist. It is emphatically not obviously the case that each of the high school buildings operated by the Board has classes throughout each building. There is, furthermore, no evidence in the record showing that the only time students would not be in class during the school day "would be during a split lunch or split assembly period." (Br. Pet. 55). The reason for the absence of such evidence is fairly clear: the "any classes rule" along with the others now before this Court were all promulgated after the only evidentiary hearings in this litigation were concluded. To our knowledge, the Board never requested an opportunity to present additional evidence in support of rules such as the "any classes rule." See, e.g. App. 1-3.

The Board should not be permitted

to promulgate regulations and have this Court reverse the courts below on the basis of unfounded allegations with respect to classes and scheduling which are found only in the Board's brief. "There is here no evidence whatever of ... interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Tinker, 393 U.S. at 508. The Board has failed "to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Tinker, 393 U.S. at 509.

To justify the "any classes rule," the Board would have to show at least the following by evidence rather than by argument:

1. That each of its high schools is so designed and constructed that the distribution of literature in any part of each high school necessarily disrupts at least one class conducted somewhere within that high school - even if that class is several hundred feet and one or two stories removed from the place of literature distribution.

2. That a "class" does not include official, supervised extra-curricular activities taking place at each high school such as foreign language clubs, debating, various indoor sports

activities, dramatic and musical events, etc.

3. That activities such as solicitations for year books, raising funds for a school band, (Br. Pet. 39), do not create any class disruptions while distribution of literature does.

4. That the distribution of "CCC" disturbed any classes in any public high schools at any time, together with a showing of the circumstances of such alleged disturbance.

5. That distribution in a school cafeteria of literature would disturb any given classes in any high school operated by the Board.

6. That there would be any time during any day of the week during which some "class" would not be in session at any public high school. Such a showing would necessarily exclude from the definition of "class" evening and early morning sessions together with the extra-curricular activities mentioned above.

The absence of proof on any of the above stated issues is not a matter of supposition. Nor is it speculative to suggest that the "any classes rule" could be applied in a manner which would effecitvely prohibit any distribution of literature at any time any persons were present at a Board controlled high school.

The Board has alleged in the course of its argument concerning another rule, that its rules "do not prevent students from giving away newspapers before or after classes." (Br. Pet. 38). On the same page of their brief, and in other parts as well, they continue to assert that students have no "free time" and that they "are required to be in a class or supervised study or activity virtually every minute of the school day." (Br. Pet. 38). We have nothing in the way of evidence, however, which defines "before or after classes," and we are, therefore, unable to determine if such periods exist in any meaningful way. We are told, for example, that a period of zero to five minutes is all that is allowed as passing time between classes. (Br. Pet. 38). If that allegation is supported by fact, the "any classes rule" could permit distribution of literature for a period of from zero to five minutes before the first "class" of the day in any given high school, and for the same period after the last "class" of the day. In the absence of any genuine evidence on any of these matters, however, one reasonable construction of the "any classes rule" is that it will be effectively a complete ban on literature distribution.

2.

The "Any Classes Rule" Goes Beyond any

Decision on Distribution of Non-Official Student Publications.

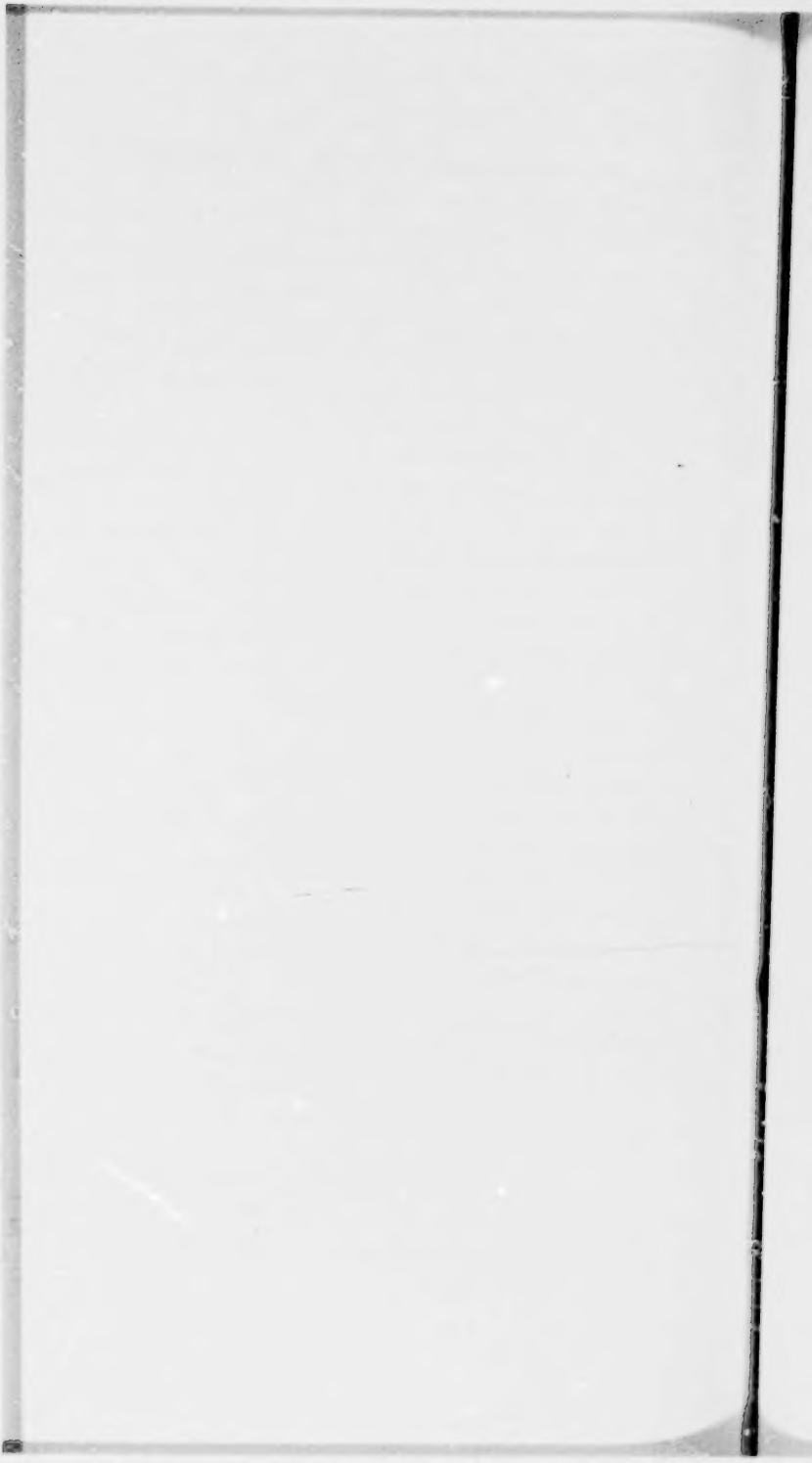
Despite the claim that "(s)imilar Board Rules have been examined and upheld by other Courts," the Board does not advance any decisions in support of the "any classes rule."

The courts below, and the appellees from the very beginning of this litigation, have recognized the appropriateness of reasonable "time, place and manner" regulations, properly justified by a factual, evidentiary showing. Cox v. New Hampshire, 312 U.S. 569 (1941); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). The Board has gone out of its way, however, to make clear its position that no reasonable time, place, or manner of distribution exists so far as it is concerned in any of its high schools if a "class" is in session anywhere at the school. It has even argued that cafeterias during lunch hour are too highly structured to permit literature to be distributed. (Br. Pet. 38, 55-56). Tinker, of course, explicitly recognized the time spent in the cafeteria as one in which students' First Amendment rights were protected and were to be exercised. Tinker, 393 U.S. at 512.

The extensive analysis of the

school environment found in Grayned v. City of Rockford, 408 U.S. 104 (1972) is possibly dispositive of this issue. The Board, it might be noted, cited Grayned as part of its analysis of the "any classes rule" at one point in these proceedings (Br. Pet. 19) but now seeks to distinguish it as a "criminal case." (Br. Pet. 55). Just as Grayned recognized that no one "has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes," we think it is equally clear that no public school system has the right to prohibit the use of all parts of a school building or its immediate environs if just one "class" of some kind is in session somewhere in that building. Grayned, 408 U.S. at 117-118. Both Tinker and Grayned must be ignored, if not overruled, in order to reach the ironic point of permitting a quiet picketer to walk on a sidewalk adjacent to a high school building and hand out handbills while classes are in session, but prohibit a student inside the same building from handing out literature in an equally quiet and non-disruptive fashion.

The Board's position is tantamount to saying that no literature distribution can take place inside of a school



building without disturbing a class. Such a position makes a mockery of the concept of "narrowly tailored" rules and "individualized" judgments of expressive activities. Grayned, 408 U.S. at 119.

The decisions in other judicial circuits upon which petitioners have attempted to rely make it clear that none of them would have permitted the "classes being conducted" rule to stand. The Fifth Circuit Court of Appeals in Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972) discussed time, place, and manner of distribution limitations, and it was made clear that reasonableness and equality of application were the touchstones for evaluating such rules. The Fourth Circuit in Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) would require the showing of substantial facts which supported a reasonable forecast of substantial disruption or material interference with school activities on account of the distribution of printed material. That Court clearly would not approve a blanket prohibition against distribution of any student publication at any time in any school simply because one or more classes were in session at some location within the school. The Ninth Circuit in Hatter v. Los Angeles City High School Dist., 452

F.2d 673 (9th Cir. 1971) specifically upheld the First Amendment rights of high school students to pass out leaflets before school on a street corner across from the school grounds. It clearly would not approve of the "classes being conducted" rule. The position of the Seventh Circuit is clear not only on the basis of the instant case, but also on the basis of Scoville v. Board of Education, 425 F. 2d 10, cert. den. 400 U.S. 826 (1970) and Fujishma v. Board of Education, 460 F.2d 1355 (7th Cir. 1972). Without summarizing the numerous District Court decisions in other circuits, it should be sufficient to say in summary fashion that none of them would approve the "classes being conducted" rule.

ARGUMENT III

The Board May Not Constitutionally Punish the Infrequent Use of "Earthy Words" Used for Emphasis or Humor on the Bases of Rules Not in Existence, of Distribution to Elementary School Students Which Did Not Occur, or as "Obscene As To Minors" in the Abscence of Erotic Content, Appeals to Prurient Interests and Patent Offensiveness.

A major shift in the position of the Board on this issue has occurred

in the course of the litigation. Before the Seventh Circuit, the Board contended that "students may be disciplined for the use of indecent language, even if not legally obscene" as a minor part of its argument covering barely one page and relying upon the Eighth Circuit opinion in Papish v. Board of Curators of University of Missouri, 464 F.2d 136 (8th Cir. 1972) which was reversed by this Court one month after the Board's brief was submitted. (Br. Pet. 62-63). Papish v. University of Missouri, 410 U.S. 667 (1973), reh. den. 411 U.S. 960. It is clear now, however, that the Board's principal argument before this Court concerning the language which they dislike in "CCC" is that it is punishable "even if such language is held to be filthy, vulgar, and indecent, but not legally obscene as to minors." (Br. Pet. 57).

The shift in argument away from alleging that "CCC" was obscene as to minors (occurring since, and apparently in response to, the decision by the Seventh Circuit in these proceedings) as well as the original Board position on the issue - are analyzed below.

1.

The Board Has Promulgated No Rules

Which Prohibit "Filthy, Vulgar, and Indecent" Language.

It cannot be too strongly stressed that the Board comes to this Court with no rule in existence which prohibits "filthy, vulgar, and indecent" language. The Board is now claiming that this Court must uphold both prior and subsequent restraints against such language (Br. Pet. 9), but it does not pretend to have any rules in existence purporting to regulate such language. Rule 1.1.1.1. applies only to words "obscene as to minors." No rule promulgated by the Board on October 4, 1972 or in conjunction with any other aspect of these proceedings, so much as mentions the words "filthy, vulgar, and indecent."

This Court is accordingly presented with an abstract proposition of law in the absence of an actual rule which embodies the proposition advocated by the Board. Hall v. Beals, 396 U.S. 45 (1969), Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972). It is well established that this Court will not volunteer an expression of its opinion upon a question which is not properly before it on the record no matter how such opinion may be desired by a party. Bayard v. Lombard,

9 How. 530. By asking this Court to determine the general powers of the Board to punish students for the utilization of such language in the absence of a rule which can be analyzed on the subject, the Court is being asked to decide what is, at best, an anticipatory question. The Court should not decide important constitutional questions unnecessarily or hypothetically. Cincinnati v. Vester, 281 U.S. 439, (1929); Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937); Allen-Bradley Local 1111 v. Wisconsin Employment Rel. Bd., 315 U.S. 740 (1942).

The Board is, in effect, asking this Court to rule generally with respect to a regulation which has never been written or promulgated. Such a request goes beyond "the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect" which this Court declined to do, holding that "it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process." Younger v. Harris, 401 U.S. 37 at 53 (1971). Here, the Court is being asked to give approval to a regulation which has not been written - or, with even more grave consequences for the

First Amendment to grant the Board the general authority to regulate the use of words as it may see fit in the future.

It is also clear that the courts below have not actually ruled on the Board's claimed power to punish students for the use of "language...held to be filthy, vulgar, and indecent..." (Br. Pet. 57). The language which has been the principal point of contention throughout these proceedings has always been construed in light of Section 1.1.1.1. which purports to punish only language which is "obscene as to minors." Indeed, the dissent of Judge Christensen differs from the majority in that he believed the language in question "(m)ore likely obscene" in the Board context than in that of Papish v. University of Missouri, 410 U.S. 667 (1973). (Pet. App. 30-31). This Court should not consider a question which was not passed upon by the Court of Appeals. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 at 397-398 (1971).

2.

These Proceedings Do Not Involve Distribution of Publications To Elementary School Students.

The Board is continuing to claim

that these proceedings involve distribution of non-official student publications to elementary school students. The same claim was advanced before the Seventh Circuit, and it is time to require that the Board come forward with evidence of distribution of the publication to elementary students within its schools. From the very beginning of this litigation, plaintiffs proceeded on a class basis under FRCP 23 (a) and (b) (2) on behalf of "all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." (App. 5-6, R.6, Complaint Par. 10). Plaintiffs have been compelled to reiterate that fact throughout these proceedings because the Board has argued as if elementary school students were actually involved. See, e.g. Appellees Brief for the Seventh Circuit, 5.

Enough confusion on this issue was successfully engendered that it became a subject of questioning during oral argument before the Seventh Circuit as reflected in its opinion showing that "plaintiffs conceded that their case was limited to the application of the rules in high schools." (Pet. App. 29, 490 F.2d at 610). Rather than being a "concession" plaintiffs were merely reiterating a position which they had taken from the beginning of the pro-

ceedings by filing their action on behalf of a class which consists only of high school students attending the Indianapolis public schools. Unfortunately, neither the majority nor the dissent in the Seventh Circuit reflected this fact. More importantly, however, no evidence exists in the record of these proceedings on the issue of alleged distribution of "CCC" to elementary school students. Since that evidence does not exist, and since the relief sought by the plaintiffs throughout these proceedings has consistently been limited to the high school setting, the court below clearly "had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools." 490 F.2d at 610. Indeed, the majority opinion closes with the clearest possible recommendation to the Board to obtain a limitation of the injunction pending against it so that it would clearly on its face apply only to high schools. The Board has chosen to ignore that invitation.

3.

Neither the "CCC" as a Whole Nor Individual Articles Taken Out of Context Are Obscene.

The Board had no rule concerning publications "obscene as to minors"

when "CCC" was distributed. The District Court correctly recognized that any application of such a rule would necessarily be prospective. 490 F.2d at 609. Recognizing also that we are not in any way talking about a publication "to be distributed among juveniles in kindergarten through high school," (Br. Pet. 62), the following analysis is presented.

a. The language of "CCC" is not erotic, sexually explicit, nor does it appeal to the prurient interest of adults or minors.

Having proposed a version of the tests propounded in Miller v. California, 413 U.S. 15 (1973) "adapted" to the Board's rules (Br. Pet. 58), we are presented with no application of the adapted rule to the facts of this case. The record contains no evidence-not even speculative testimony - indicating that any of the material in "CCC" "appeals to the prurient interest of minors," or "depicts or describes sexual conduct in a manner patently offensive to prevailing standards of the adult community with respect to what is suitable material for minors..." (Br. Pet. 58) We are asked to accept, in the absence of any evidence, the fact that the language of which the Board in complaining "can only appeal to the prurient, shameful

interest of minors." (Br. Pet. 63). Even if there had been evidence that the language was disruptive (and there was none), disruption does not constitute obscenity under any standard.

No comment is to be found in the Board's brief with respect to alleged depictions or descriptions of sexual conduct because there simply are none in "CCC." In the handful of instances that they found offensive out of the considerable content of the five issues of "CCC", we are asked to apply, along with the other standards of the "adapted" Miller test, a standard which requires the whole work to lack serious literary, artistic, political, or scientific value to minors. Among the small instances of allegedly offensive language, we must find that D.H. Lawrence and Christabel Pankhurst have no serious literary, artistic, political, or scientific value to minors. (App. 56-57)

The Board's argument appears to actually be more concerned with offended sensibilities than it does with obscenity. The Board is essentially asking this Court to react to the utilization of a small number of words in print with no evidence on the allegations of disruption and damage allegedly resulting from the use of those words in print except the opin-

ion of Dr. Kalp. The Board has not stressed in its brief before this Court, for example, language which it brought to the attention of the Seventh Circuit. That language included the word "hell," and the phrase "pushy bitch." (Appellants' brief before the Seventh Circuit, 6.) Objection to such language is difficult to imagine on any grounds except offended sensibilities.

Even though no "obscene as to minors" rule existed when "CCC" was established and there was no rule or charge specifically against "CCC" or in general effect concerning "filthy, vulgar, and indecent" language, if this Court decided to reach this issue, the question could be viewed largely as one of determining whether public high school circumstances differed so much from those in a public university as to render Papish v. University of Missouri, 410 U.S. 667 (1973) inapplicable. After initially inquiring about their rights, plaintiffs were informed by the Board that they could not continue to distribute "CCC". At that time, the Board was not utilizing a "non-discriminatory application of reasonable rules governing conduct" but there was "a dual standard in the academic community with respect to the content of speech..." Papish, 410 U.S. at 671.

Cohen v. California, 403 U.S. 15 (1971) involved some of the language of which the Board is complaining in these proceedings. The language was displayed publicly on a jacket inside a courthouse, in the presence of women and children. Relying in part upon Tinker, the Court held that the State could not, in the absence of a more particularized and compelling reason, make the display of the four-letter expletive a criminal offense under the First and Fourteenth Amendments. Cohen, 403 U.S. at 26. Gooding v. Wilson, 405 U.S. 518 (1972) involved a minor demonstration outside of a building in which a United States Army headquarters was located. The Court found that the statute in question could not constitutionally be applied to speech "although vulgar or offensive, that is protected by the First and Fourteenth Amendments." Gooding, 405 U.S. at 520. Eaton v. City of Tulsa, __U.S.__, 39 L. ed. 2d 693 (1974) involved the usage of language, such as that objected to by the Board, in the course of a trial in a municipal courtroom. The Court held that the petitioner could not be subjected to criminal contempt for his usage of the language. In a concurring opinion, it was noted that the controlling fact for one Justice was that the petitioner had received no warnings or cautions with respect to court etiquette. "Language likely

to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances." Eaton v. Tulsa, 39 L. ed. 2d at 696-697. Additionally, the Fifth Circuit has held that "four-letter words" were not obscene per se and could not be constitutionally censored in a public university. Although the publication in question was school-sponsored, it was sold at the university bookstore facilities and - as with the "CCC" was "not being forced on an unwilling audience through public display." Bazaar v. Fortune, 476 F.2d 570, 580 (5th Cir. 1973), pet for cert January 23, 1974 sub nom Fortune v. Bazaar, 42 LW 3504 (No. 73-1144).

Fortune contains several penetrating paragraphs on the "earthy words" which apply to the circumstances of this case. Significantly, the Fifth Circuit noted many works such as The Catcher in the Rye, The Godfather and others which were cited by individual plaintiffs in the instant case as books which they had read, upon the recommendation of the mother of one of the plaintiffs who is a history teacher in a public school system other than in Indianapolis. Relying upon Tinker, among other cases, the opinion in Fortune recognized that the "offensive" words were used as "modi-

fiers strictly included for their effect and to convey a mood." The Court found that no "pandering" was involved. It found that the language was not used in any erotic sense. Bazaar v. Fortune, 476 F.2d at 573. The same findings are valid with respect to the "CCC". The Board's position, as that of the University of Mississippi, eventually abandons obscenity and concentrates upon "taste."

It should be noted that the Fifth Circuit confronted a possible problem of mootness or being called upon to rule on an anticipatory issue. That Court found that the University of Mississippi had no rules regulating the publication in question at the time officials attempted to censor it. Furthermore, the Court stayed the temporary restraining order issued by the district court "to avoid publication which would moot the serious legal issue involved..." Fortune v. Bazaar, 476 F.2d at 571. In this case, as has been discussed above, "CCC" was distributed for approximately one year before voluntary termination of distribution, and it has been distributed since the Board was subjected to the pending injunction in these proceedings.

b. The infrequent use of "earthy words" for emphasis or humor in a non-

official student publication without regard to the specific circumstances of such usage cannot constitutionally be punished by censorship or expulsion.

The "CCC" clearly has never constituted any form of commercial exploitation of obscene material. There are no "hard core" materials of any kind involved in these proceedings. While many adults are not inclined to take seriously the journalistic or literary efforts of high school age people, a genuine review of all five issues of "CCC" would make it difficult to suggest that the publication lacked "serious literary, artistic, political or scientific value..." Miller v. California, 413 U.S. at 34. And, as was recognized by the Seventh Circuit, it goes without saying that Rule 1.1.1.1. does not even approach making an effort at the kind of specificity which this Court found essential in the area of limiting First Amendment expression by defining certain things as "obscenity." Indeed, plaintiffs believe that the Board is essentially asking this Court to write an acceptable "obscene as to minors" rule for it. If the "adapted" Miller tests now proposed by the Board had been promulgated as part of a regulation at the beginning of these proceedings, it would have been possible for the District Court to render an opinion on the allegations

of obscenity against "CCC". (Br. Pet. 58). If this Court passes upon these "adapted" Miller standards, it will be reviewing regulations which do not exist, which have never been applied to the plaintiffs, which are supported by no judicial interpretations of any kind, and which have first appeared in a brief upon the merits before this Court.

The Board has been compelled to rely on one state and one federal lower court decision, each originating in California, and each prior to Cohen, Papish, Eaton, and related cases. One of the two California decisions, Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D. Cal. 1969) is cited for having upheld schools that "discipline students for indecent language.." (Br. Pet. 69). Two significant facts about Baker should be noted. First, the school board in that case did at least have a rule which required students to "refrain entirely from the use of profane and vulgar language." Baker, 307 F. Supp. at 525. The second, and more significant fact about the case, is that it appears that no other court has ever followed the Baker holding on "vulgarity" and "profanity."

Contrary to the contention that "most courts" have upheld the Board

position (Br. Pet. 69), it appears that a greater number have upheld the position of appellees. See, e.g. Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1394-1396 (ED Mich.1969). While the Board has correctly noted that the Court below relied upon Sullivan v. Houston Independent School District, 333 F. Supp. 1149 (S.D. Tex.1971), the opinion which occurred with respect to supplemental proceedings found at 475 F.2d 1071 (5th Cir. 1973) is significant in several respects. First, the heart of the holding was that the court merely recognized the right of school authorities to punish students for the flagrant disregard of established school regulations together with the fact that the student plaintiff in the supplemental proceedings was unable to seek equitable relief with clean hands. No issue concerning allegedly obscene words was reached or decided by the Fifth Circuit in that opinion. Vought, on the other hand, dealt specifically with the allegedly offensive language involved in these proceedings, noted that the evidence disclosed that The Catcher in the Rye contained the same language and was required reading along with an issue of Harper's Magazine which contained the same language. Vought, 306 F. Supp. 1388 at 1395-1396.

The decision in Keefe v. Geanakos,

418 F.2d 359 (1st Cir.1969) is perhaps the strongest on the "earthy words" issue. Keefe involved the most horrendous facts imaginable from the Board's point of view. The plaintiff was the head of an english department in charge of coordinating grades 7 through 12 in his high school. He read and discussed "a vulgar term for an incestuous son" contained at several points in an article in the September 1969 issue of the Atlantic Monthly. The teacher was suspended and remained during the litigation in considerable jeopardy of being dismissed over the fact that the language was read aloud and discussed with high school seniors. The Court found that the language involved was an appropriate part of the article, that no disruption to the educational process was involved, that the language was in no sense pornographic, and that the teacher was exercising First Amendment rights in an appropriate fashion. Keefe involves a true "captive audience" as opposed to the situation with respect to the "CCC" whereby students who wished to read the publication were free to obtain one, but it was not thrust, pandered, or in any other way forced upon a "captive audience" of thousands upon thousands of high school students in the Indianapolis secondary public school system.

c. Permitting the Board to censor non-official publications or expel students for producing them merely because they infrequently contained "earthy words" and without regard to time, place, or manner of their distribution, would create an extreme double standard with respect to the usage of words.

At the heart of the Board's position in this case is the argument that the "earthy words" infrequently found in "CCC" are actually harmful to students, disrupt the educational process, dismay teachers and parents, interfere with the attainment of educational objectives, and serve no significant purpose (among other things). It is nonetheless clear - even though the "obscene as to minors" rule was promulgated after the only evidentiary hearings in these proceedings - that the language which the Board seeks to keep out of its schools when contained in "CCC" is necessarily already in its schools in innumerable instances, whether in books, magazines, newspapers, locker room conversation, or otherwise.

The extremity of the double standard which would result from permitting the Board to punish (totally aside from the lack of regulations and related arguments above) the infrequent

use of "earthy words" in a student non-official publication is seen by examining the materials which also would need to be kept out if the rules were applied consistently and uniformly.

Newspapers of national circulation which carried or commented upon language employed by former President Richard M. Nixon contain abundant examples of "earthy words." Editorials such as "Help for the President" in the Wall Street Journal of Wednesday, July 17, 1974, p. 12 would have to be censored in accordance with the Board's view, or removed from any school library, economics or business classroom where they appeared. Webster's New Collegiate Dictionary (1973) appears to contain definitions of virtually all of the language of which the Board is complaining. Webster's New Collegiate Dictionary (1973), 463, 1038 and 1071. Apparently, that rather ubiquitous reference work would also have to be removed from Indianapolis public high schools.

Magazines as diverse as the New Yorker and Time would have to be removed from libraries, english classes, and history classes if they were found in the Indianapolis public high schools. See, e.g. The New Yorker, April 19, 1974, "Moses and LaGuardia, 45 & f;

Time, July 29, 1974, "Passim (see e.g. "Nixon Listens to His Tapes," 23); Time, August 19, 1974 "Stay to Hell Out of This," 18-19. A considerable amount of Shakespeare would have to be removed - or, at least any accompanying notes which explained the meaning of some of the words which are no longer utilized. Mention has been made of various contemporary novels which also would need to be removed. As was pointed out in Keefe, the most objectionable word in these contexts is neither novel nor an adequate basis upon which to punish students or teachers in high schools. Keefe v. Geanakos, 418 F.2d 359 at 361-362.

Although the District Court in Vought was unable to profess any expertise in the area of obscenity, it pointed out that "we do recognize rank inconsistency when we see it." Vought v. Van Buren Public Schools, 306 F. Supp. at 1396.

d. Offended "sensibilities" may not constitutionally be the basis for suppression of allegedly offensive language contained in a non-official high school student publication.

The cases involving injury to "sensibilities" through the use of allegedly offensive language have generally involved oral, non-

commercial expression. Numerous cases have been decided by this Court since Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Cohen v. California, 403 U.S. 15 (1971) marked the first major decision concerning allegedly offensive language since Chaplinsky. Cohen involved certain factors which we have previously discussed, but which deserve additional emphasis. One of the major factors observed by Justice Harlan was that the language in question did not involve obscenity for "obscene expression...must be, in some significant way, erotic..." Cohen, 403 U.S. at 20. Cohen also is quite significant in that it recognizes value in expression which communicates emotions as well as that which communicates a particular concept or intellectual idea. And, as has been previously recognized, Cohen found that those observers who were offended by the language on the petitioner's jacket "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." Cohen, 403 U.S. at 21. A similar averting of eyes might be the most extreme measure which would need to be taken by any person offended by language visible on a cover of "CCC".

In Gooding v. Wilson, the Court was confronted directly with state court decisions from Georgia which had con-

strued the statute in question as including offenses to public "sensibilities." Gooding, 405 U.S. at 527. In holding the statute unconstitutionally overbroad on its face, in the face of the Georgia state constructions of the statute, the concept of offended "sensibilities" was found to be a constitutionally inadequate basis for suppression of speech.

The Court has reversed or reversed and remanded numerous cases involving allegedly offensive language. See, e.g. Lewis v. New Orleans, 408 U.S. 1053 (1972); Hess v. Indiana, ___U.S. ___, 38 L. ed. 2d 303 (1973); and Eaton v. City of Tulsa, ___U.S.___, 39 L. ed. 2d 693 (1974).

With the exception of Papish v. University of Missouri, 410 U.S. 667 (1973), the most significant offended "sensibilities" decision since Cohen was that in Rosenfeld v. New Jersey, 408 U.S. 901 (1972). Rosenfeld involved the use of language similar to that objected to by the Board in these proceedings. The appellant had utilized one word in particular on at least four occasions during a speech at a public school board meeting. The appellant was charged under a "disorderly person" statute which prohibited the utilization of "loud and

offensive or profane or indecent language." Rosenfeld, 408 U.S. at 904 (Powell J., dissenting). The New Jersey Supreme Court had construed the statute to apply to language which would "affect the sensibilities of a hearer." State v. Profaci, 56 N.J. 346, 353, 266 A 2d 579, 584 (1970), quoted at 408 U.S. at 904 (Powell, J., dissenting). Rosenfeld, as indicated above, was remanded for reconsideration in light of Cohen and Gooding. An excellent analysis of the development of the Court's position on allegedly offensive language is found at 9 Harv Civ Lib-Rights L Rev 1 (1974) "Offensive Language and the Evolution of First Amendment Protection," Mark C. Rutzick.

Papish represents explicit application of the offended "sensibilities" line of cases traced above to an educational setting. As we have previously stated, a resolution of the Board's position on the allegedly offensive language could be based upon a determination of whether or not Papish involves an environment so substantially different from that of Indianapolis high schools as to require a different result in the latter situation. It is again submitted that this Court should not, in the absence of real evidence on the issue, take

judicial knowledge or the allegations of the Board in its brief as a showing that harm, retaliation, fighting, or other "violent reaction," occurred as the result of any of the "CCC" publications. Cohen, 403 U.S. at 21.

ARGUMENT IV

A School Board Rule Which Requires Prior Approval By Public School Authorities Of An Unofficial Student Newspaper Before Publication In The Secondary Schools Is Unconstitutional.

Taken as an entirety, Rules 11.05 and 11.06 unconstitutionally abridge the First Amendment rights of public secondary school students who publish, distribute, sell and/or receive voluntary contributions for the "CCC" (see Arguments I to III, supra). Moreso than "chilling" freedom of the press, the subject rules firmly suppress the full and free exchange of ideas in an environment particularly designed to promote thought and expression. The overbroad, vague restrictions imposed (Argument I, supra) upon the secondary school students in this case effectively preclude publication, distribution and sale of the "CCC" as hereinbefore set forth.

The Board's reliance upon Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) is misplaced in light of Papish, Cohen, supra. Additionally, Chaplinsky involved oral communication

rather than an impermissable prior restraint upon publication, Near, Tinker, Healy v. James, Police Department v. Mosley, supra. The overbreadth of the repressive rules, Fujishima, supra, Eisner v. Stamford Board of Education, 440 F. 2d at 809, the absence of explicit criteria by which school officials may definitively forecast substantial disruption, combined with the absence of any evidentiary basis for banning the "CCC", compels affirmance of the decisions below.

Ironically, the Board seeks a review of rules (Br. Pet. 75-77; Appl 19) which were amended and superceded by those which are now before this Court for adjudication. Evidently, the Board is requesting this Court to select, if not write, rules for the Board. Indeed, Resolution No. 1033 (App. 17-20) adopted in September, 1972, was superceded by the Resolution adopted in October, 1972 (App. 22-25). At no time was Resolution No. 1033 before the trial or appellate court for review, nor can such issue be raised before this Court for the first time. (Argument III A, supra). Conclusively, constitutional issues "will not be anticipated but will be dealt with only as they are appropriately raised upon a record before" this Court. Allen-Bradley Local v. Wisconsin E. Rel. Bd., 315 U.S. at 746 (1942). The record before this Court does not properly raise consideration of rules which were amended, superceded and never previously argued before

either the trial or appellate courts, even if termed as "guidelines" rather than acknowledged as part of an inoperative rule (App. 17-20; Br. Pet. 75-79).

ARGUMENT V

Minor Public High School Students, Who Are The Real Parties In Interest In Litigation Challenging The Constitutionality Of Public High School Regulations Which Require Prior Unilateral Administrative Approval Of Student Publications And Which Prohibit The Sale And Distribution Of Student Publications, May Properly Sue In Federal District Court In Their Own Names Pursuant To Rule 17, Federal Rules Of Civil Procedure, Without Appointment Of A Guardian Ad Litem, Especially Where Some Of The Student Plaintiffs Are No Longer Minors.

Rule 17(a), Federal Rules of Civil Procedure, provides, inter alia, that "(e)very action shall be prosecuted in the name of the real party in interest." The meaning and intent of this statement is analyzed in 3A J. Moore, Frederal Practice §17.02, at 53 (2d ed. 1970) to be:

> "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."

See, 6 Wright and Miller, Federal

Practice and Procedure, §1542 at 639 (1971). Herein, plaintiffs are the parties who, by the substantive law, are seeking to enforce their fundamental constitutional rights. Indeed, it is now well established that high school students may commence actions seeking relief for infringement of constitutional rights under 42 U.S.C. §1983, Fujishima, et. al. v. Board of Education, 460 F. 2d 1355 (7th Cir. 1972), and that high school students are "persons" entitled to First and Fourteenth Amendment protections, Scoville v. Board of Education of Joliet Tp. H.S. Dist 204, et al, 425 F. 2d 10, 13 (7th Cir. 1970); Tinker v. Des Moines Community School District, 393 U.S. 503 (1969). Our law clearly recognizes the independent constitutional rights of minors without requiring such rights to be derived from those possessed by adult parents. As Mr. Justice Fortas said: "Under our constitution, the condition of being a boy does not justify a Kangaroo Court." In Re Gault 387 U.S. 1, 28 (1967).

The substantive constitutional right which plaintiffs have sought to protect is the right of public high school students to distribute and sell a student publication in the public schools of Indianapolis without prior censorship (Tr. 82-84), a right which belongs to the minor students, see, Travelers Indemnity Company v. Bengtson, 231 F. 2d 263, 265, some of whom under recently enacted Indiana

state law, having attained the age of eighteen (18) years during the course of these proceedings, are no longer under any legal disability, I.C. 34-1-67-1(6) and (15) and, therefore, are not presently minors.

Rule 17(b), Federal Rules of Civil Procecure, provides, inter alia, that "(t)he capacity of an individual, other than one acting in his representative capacity, to sue or be sued shall be determined by the law of his domicile." Examination of applicable Indiana state law reveals that Trial Rule 17(C)(1), Indiana Rules of Trial Procedure, provides:

> "An infant or incompetent person may sue or be sued in any action in his own name,"

Nowhere in Indiana state law is there a mandatory requisite that a minor have a guardian ad litem appointed for the purpose of prosecuting an action in court. Accordingly, it becomes apparent that the formerly minor plaintiffs in this proceeding may sue in their own name without the appointment of a guardian ad litem or other representative. This result is compelled by applying Indiana Trial Rule 17(C)(1) and I.C. 34-1-67-1(6) and (15) to the provisions of Rule 17(b), Federal Rules of Civil Procedure.

Defendants argument that the appointment of a guardian ad litem is mandatory is unmeritorious. As stated in 3A J. Moore, Federal Prac-

tice §17.26, at 901 (2d ed. 1970):

> "We have seen that the capacity of an individual, not acting in a representative capacity, to sue or be sued is determined by the law of his domicile under Rule 17(b). If that law denies the individual capacity upon the ground that he is an infant or incompetent person, the litigation of his rights in the federal courts is subject to the provisions of Rule 17(c)."

Inasmuch as Indiana state law authorizes minors to sue in their own names, defining "minor" as one below eighteen years of age, consideration of the application of Rule 17(c), F.R.C.P., as argued by defendants, is precluded. Thus, independent of the district court's determination that it was not required "to appoint a guardian ad litem for one who presents a constitutional issue to the Court" (App. 26-27) is the principle that the minor plaintiffs, who asserted their constitutional rights, have authorization pursuant to state law to sue in their own names without the appointment of a guardian ad litem. 2 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961), §488.

Defendants' reliance upon Roberts, et al v. Ohio Casualty Insurance Company, 256 F. 2d 35 (5th Cir. 1958), is misplaced. In Roberts it was the un-

represented minor who obtained a reversal for failure to appoint a personal representative. The Roberts case is further distinguishable in that no claim was made in that case that Ohio state law authorized prosecution of an action by minors under Rule 17(b), F.R.C.P. In contrast, plaintiffs in this proceeding assert a fundamental state law right to sue in their own names pursuant to Trial Rule 17(C)(1), Indiana Rules of Trial Procedure, and I.C. 34-1-67-1(6) and (15). No substantial pecuniary interest is presented in this action as opposed to the substantial death benefits present in Roberts, providing yet another differentiating factor.

Where the court makes a judicial determination that a minor is protected without the appointment of a guardian ad litem, it is unnecessary to appoint such a representative, especially where there is no showing of inadequate representation or prejudice to any party. Roberts, supra at 39; see, Till v. Hartford Accident & Indemnity Co., 124 F. 2d 405, 408 (10th Cir. 1941); Westcott v. United States Fidelity & Guaranty Co., 158 F. 2d 20, 22 (4th Cir. 1946); Rutland v. Sikes, 203 F. Supp 276 (E.D.S.C. 1962), aff'd on other grounds, 331 F. 2d 538 (4th Cir.), cert. denied 374 U.S. 830.

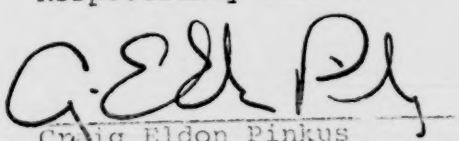
Conclusively, the denial of the Petition for Appointment of Guardian Ad Litem on Next Friend for Plaintiffs and All Members of the Class They Purport to Represent by the district

court was proper, compelling affirmance of its decision.

CONCLUSION

For the reasons hereinbefore set forth, respondents respectfully submit that the judgments of the courts below should be affirmed.

Respectfully submitted,



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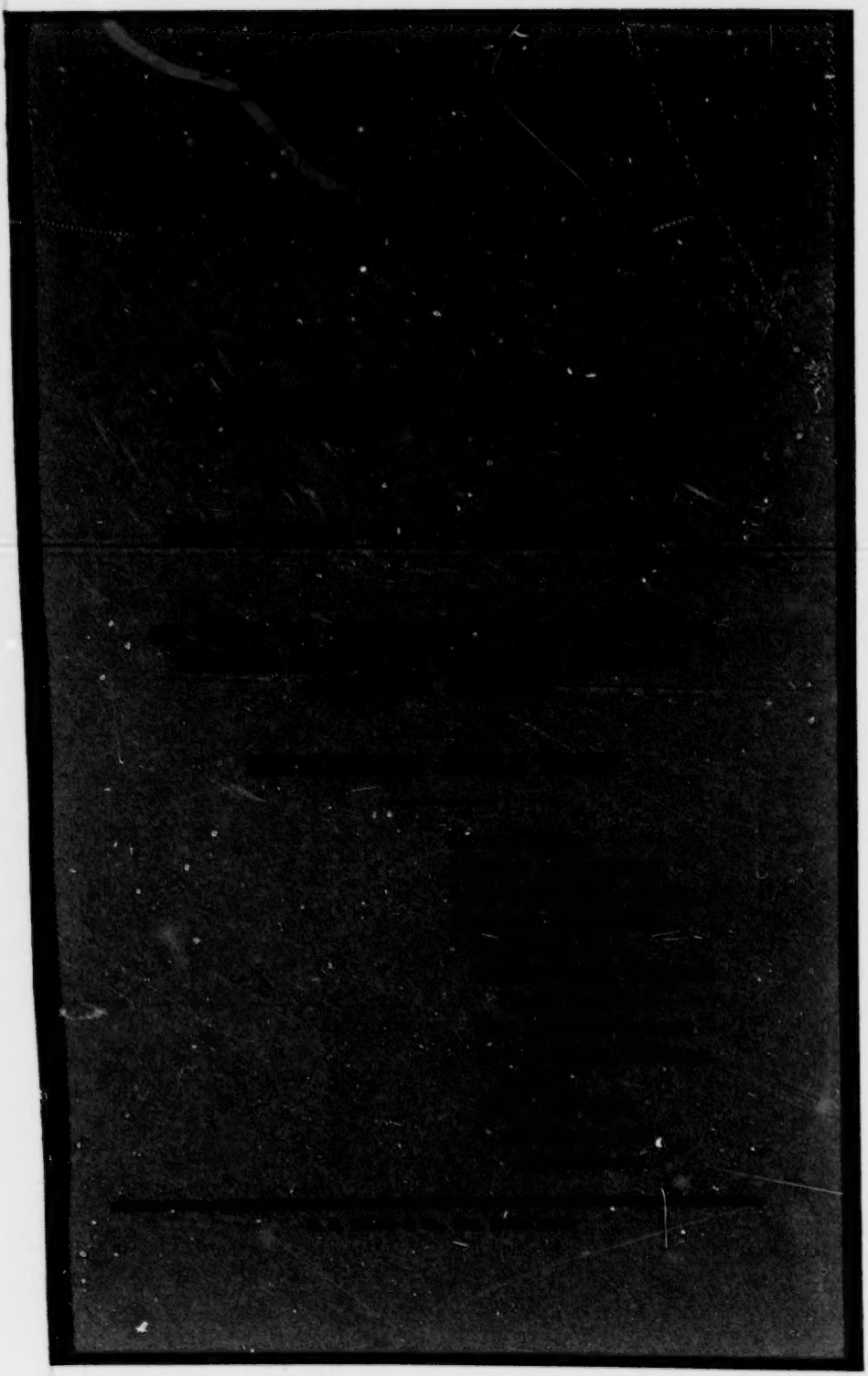

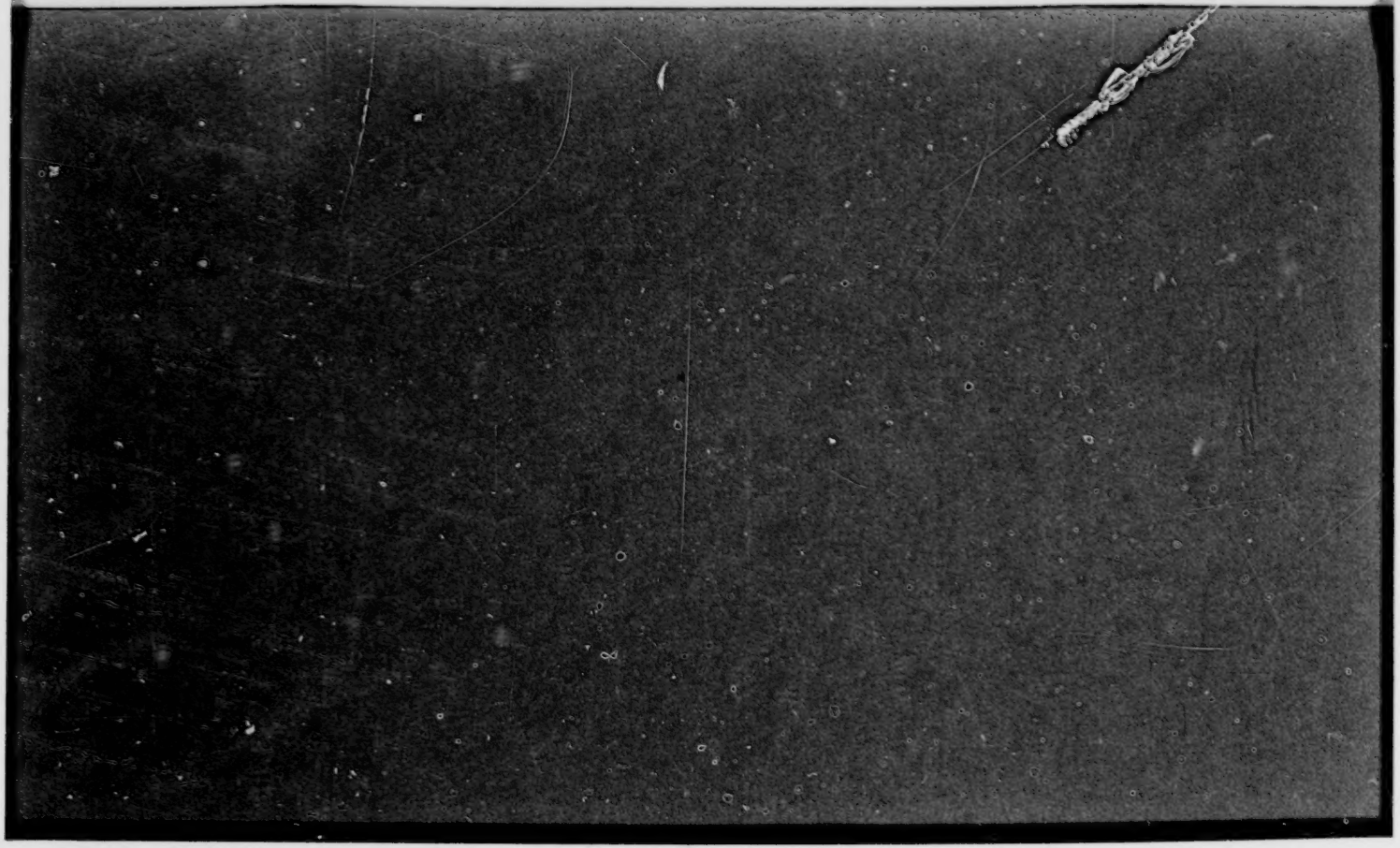

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IN THE

Supreme Court of the United States

TERM 1973

NO. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

ARGUMENT I

A. CRIMINAL STANDARDS FOR OVERBREADTH AND VAGUENESS NOT APPLICABLE TO BOARD REGULATIONS.

Respondents make no direct or relevant reply to Petitioners' argument that the identical constitutional standards and tests for overbreadth and vagueness which are applicable to criminal statutes should not be applied to school board regulations subjecting students to disciplinary measures for certain activities in schools. No cases were cited supporting the Seventh Circuit's view that the stand-

ard should be the same. Instead Respondents merely cite numerous cases that have absolutely no relevance to this issue and can serve only to clutter the record. For example, they state that the standards or tests applied in First Amendment cases under the labels "vagueness" and "overbreadth" are also employed in civil contexts, citing two *criminal* cases in support of this proposition. *Connally v. General Construction Co.* (1926), 269 U.S. 385, 70 L.Ed. 322, held fatally vague a criminal statute which threatened an employer with criminal prosecution for failure to pay current wages in the locality without any definition of what sum constitutes a "current wage" or what the term "locality" meant. However, the Court said "In other connections or under other conditions, the term 'locality' might be definite enough, but not so in a statute such as that under review imposing criminal penalties." (70 L.Ed. at 330) The second case cited by Respondents, *Lanzetta v. New Jersey* (1939), 306 U.S. 151, 83 L.Ed. 888, also involved a criminal statute which made it a crime for a person not engaged in any lawful occupation who had previously been convicted of a crime or disorderly conduct to be a known member of any gang of two or more persons. The penalty was 20 years imprisonment. In fact, most of the cases cited by Respondents were criminal cases and thus not applicable to this issue.

Instead of discussing the issue, Respondents quote broad statements from cases to the effect that students have First Amendment rights and that schools should not be enclaves of totalitarianism or attempt to foster a homogeneous people. See, *e.g., West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 87 L.Ed. 1628, which held unconstitutional a board regulation requiring a compulsory flag salute by students. Students were expelled for refusing to salute the flag on the grounds of religious principles and expulsion subjected them to being proceeded against as

delinquents and also subjected parents to criminal prosecution for such expulsions. This case did not involve vagueness or overbreadth. It is important to note, however, that the Board has never suggested that the First Amendment does not apply to students or Board regulations. The issue is whether the *same* standards of specificity applicable to criminal statutes or even to statutes in general must also apply to Board rules and whether courts can declare facially void for overbreadth a Board regulation because it conceivably could be applied in an unconstitutional manner. Such a facial approach, particularly when none of the Rules in question have even been applied to any students, is not required by the Constitution and has been employed by this Court only in exceptional circumstances.

The two cases of this Court cited by Respondents to support their argument that it is proper to consider hypothetical impermissible applications of statutes (Resp.Br. 42) involved *criminal statutes* and factual situations and objectives so far different from the case at bar in terms of the actual and apparent danger of suppressing important protected speech that their relevance to the instant case is at best remote.

The claim that the First Circuit and this Court have utilized the same facial approach in examining Board rules as the courts below is unmeritorious. In *Riseman v. School Committee of Quincy* (1st Cir., 1971), 439 F.2d 148, the First Circuit declared a prior restraint rule containing no procedural safeguards unconstitutional *as applied* to a student. The case is not even pertinent to this issue. This Court, in *Tinker v. Des Moines Independent School District* (1969), 393 U.S. 503, 21 L.Ed. 2d 731, and in other cases cited by Respondents (Resp.Br. 25), has never implied that a school board must be held to the same strict standards of specificity as are legislatures in defining criminal conduct. To suggest that *Tinker* must be overruled to hold for the

Board on this issue is ridiculous, since *Tinker* never even discussed such a facial approach.

Respondents incorrectly state that the Board has advanced only three reasons for its position that standards used to facially invalidate criminal statutes should not be applied to Board regulations. The Board's Brief discussed at least eight reasons, five of which are ignored by Respondents. The Board fails to see any merit in Respondents' argument that simply because an Indiana statute provides elaborate procedural safeguards governing expulsion of students, all substantive standards in judging whether a *criminal* statute is fatally overbroad or vague must also be applied to Board rules.

The mere fact that many procedural safeguards are accorded to students before they may be expelled from school further supports the Board's power to promulgate more flexible rules with greater breadth than may be tolerated in penal statutes because the expulsion statute insures that such rules would not be acted upon arbitrarily.

B. COMMUNITY-AT-LARGE V. SCHOOL. MAY CONDUCT OR LANGUAGE OF MINOR STUDENTS NOT REGULATED IN THE COMMUNITY-AT-LARGE, BE CONSTITUTIONALLY REGULATED IN ELEMENTARY AND SECONDARY SCHOOLS?

The first point made by Respondents under this issue asserts that schools may not generally prohibit distribution of non-official student publications. Yet the Board has never argued, nor do its Rules require, such a general prohibition, even in the schoolhouse. The Board has merely contended that the geographical location of the actor is an important factor in determining the constitutional protection that should be afforded to his or her acts. Due to significant differences between a grade or high school and the community-at-large, the Board Rules in question are reasonable,

necessary and should be upheld, even though some of the conduct regulated by these Rules might be accorded constitutional protection when engaged in by persons in the general community. Yet the many cases cited by Respondents and the Court of Appeals concern behavior of adults in the community-at-large under entirely different circumstances, and are not valid support for the facial invalidation of the Board Rules.

The second contention of Respondents is that the genuine question is whether there was any evidence introduced by the Board to justify the various Rules in question. This misleading argument is made repeatedly throughout Respondents' Brief. It is important to remember, however, that the Rules in question were adopted *after* the hearing and that these Rules have never been applied to Respondents or any other students. Since these Rules differ substantially from the original broad Rules requiring prior approval before any material is distributed or sold at school, which were the only Rules in existence at the time of the evidentiary hearing, it is both inappropriate and misleading to repeatedly remark that the Board introduced no evidence to justify Rules which were adopted after the hearing. The Board was never given an opportunity to apply these new Rules to any situation because the Court declared them unconstitutional for overbreadth.

Respondents' third argument (Resp.Br. 32) is not relevant because it is basically a statement that the special characteristics of the school environment require greater exercise of First Amendment rights at school than in many environments, such as a jail or hospital. Respondents apparently missed the point of the Board's argument. The Board would scarcely characterize a jail or the U. S. Army as the community-at-large. The Board's contention was twofold—One, that the Board or school officials should constitutionally be able to control certain behavior inside a

schoolhouse which constitutionally might be protected in the community-at-large. Therefore, any cases cited concerning attempts to regulate expression or conduct in the general community cannot be validly applied to the school community due to its special characteristics and goals. Second, in support of this proposition, the Board believes that valid analogies can be made to constitutional restrictions or regulations of conduct permitted in other institutions, such as hospitals, or the Army, due to their special characteristics. Although the environment and purpose of the Indianapolis schools cannot be equated to that of the military or a jail, certain justifiable comparisons can be made because of the fact that these institutions, like elementary and secondary schools, have different structures and goals than the general community and a special need for maintenance of discipline and order, and thus the officials of said institutions must have greater discretion and broader powers to prescribe and control the conduct of their inhabitants. Said controls might not be constitutionally permissible outside of the institutions. A recognition of this analogy and the principles applied in such cases as *Parker v. Levy* (1974), — U.S. —, 41 L.Ed.2d 439, in no way requires that *Tinker* must be overruled as Respondents suggest. In fact, this Court recognized in *Tinker* that First Amendment rights are to be applied in light of the special characteristics of the school environment.

It should also be emphasized that the Board Rules make no attempt to regulate any behavior outside of the school environment and thus students are left free to distribute, sell and say whatever they wish beyond the schoolhouse gates.

The Board Rules control only that behavior which, in the opinion of the Board, is necessary so that vital educational goals can be achieved in an atmosphere which must be maintained if any learning is to take place. If children

could be free to say, sell and distribute whatever they please and whenever they please in the schoolhouse, the schools might as well close because educational objectives could not be achieved in such a chaotic atmosphere.

The Board fails to see the relevancy to any issue in this case of statements made by Respondents that personal inter-communication among the students is a significant activity which could occur in the cafeteria, on the playing field or on the campus during authorized hours and that a robust exchange of ideas in schools is to be encouraged (Resp. Br. 34-36), since such communication would be encouraged rather than prohibited by the Rules in question. Also totally irrelevant is the case of *San Antonio School District v. Rodriguez* (1973), 411 U.S. 1, since this decision upheld the state's method of financing education, stating that it rationally furthered a legitimate state purpose and thus did not violate the equal protection clause and was a responsible attempt to arrive at practical and workable solutions to educational problems. The mere fact that this Court found that education presents a myriad of "intractable economic, social and even philosophical problems" does not in any way demonstrate any constitutional violation presented by the Rules in the case at bar. We note that Respondents, in quoting this case, omitted the rest of the paragraph, stating that "in such circumstances, the judiciary is well advised to refrain from imposing on the state inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keep abreast of every changing condition." (36 L.Ed.2d at 49) The state's statutory system for financing public education, even with its conceded imperfections, was upheld nevertheless because it was rationally connected to a legitimate state purpose. This is precisely what the Board has been arguing in the case at bar.

Several inaccuracies appear in Respondents' Brief (36-37). It is not true that the students voluntarily terminated distribution before any official or teacher requested that they stop distributing the publication. Distribution of the *CCC* ceased only after Dr. Kalp, then Assistant Superintendent, ordered it to cease because of the obscenities and indecencies contained therein. (App. 30) The statement (Resp. Br. 37) that each of the Rules now in question was adopted in a relative vacuum and not in response to any behavior by the Respondents except for the institution of this litigation is somewhat misleading, since both amendments of the Rules were in direct response to court orders requiring such amendments. It is true that the Rules were never applied to the students. The Board's original Rules requiring prior approval were declared unconstitutional by the District Court which ordered the Board to adopt new guidelines. (App. 1-2) The first amendment of the Rules also required prior approval of student literature but added numerous safeguards. After the Court made it clear that no prior restraints would be tolerated, it ordered these Rules further amended (App. 2). This order resulted in the second amendment of the Rules permitting only subsequent restraints. The invalidation of both amendments was appealed.

The remainder of Respondents' argument (Resp. Br. 37-46) is misplaced since it is not pertinent to Question I or any issue thereunder. Respondents attempt to negate two cases (cited by the Board under Question II) which upheld rules on sales and solicitations similar to Board Rules 11.06 and 11.05, Section 1.3.1.5. This discussion properly involves Question IIA and will be discussed under that issue.

Then Respondents list nine statements appearing in the Board's Brief under various issues which allegedly constitute speculative problems resulting from the distribution

of the *CCC* in the schools. Respondents repeatedly attempt to mislead this Court by claiming that the Board introduced no evidence to demonstrate that any of these harms or problems occurred despite widespread distribution of the *CCC* in the Indianapolis high schools over a period of one year prior to the commencement of this suit and during the two years since the Board was enjoined from enforcing the Rules here in question. (Resp. Br. 38, 46)

This argument is highly improper and misleading for several reasons. First, although Respondents claim that the *CCC* was distributed in Indianapolis high schools over a period of one year, there is no evidence in the record to support this allegation. The record reveals sporadic distribution of the *CCC* by a few students in two large high schools and elsewhere in the general community. A total of some 200 copies were distributed both on and off school property. Second, to state that the *CCC* has been distributed for two years since the District Court's injunction against the Board and that none of the dire predictions have resulted from such distribution appears to be a desperate attempt to divert the attention of this Court from the issues properly under consideration—those issues presented below and founded on the record below. This is an appeal to this Court and not a trial of new matter. Petitioners submit their case on the record below. Petitioners do submit, however, in response to the improper claims of Respondents, that only a very few copies of the *CCC* were distributed on school property (outside two high schools) since the injunction, and also that there are serious problems in the schools due to the decision and injunction of the courts below.

Third, the only hearing in this case was a brief one concerning the validity of Rules requiring prior approval of all exhibits, publications, and sales and solicitations at school, which Rules contained no procedural or substantive

safeguards and are not in question at this time. There was no hearing on any of the subsequent amendments of these Rules and thus it is improper to chastise the Board for its failure to introduce evidence to support the validity of new Rules when in fact no evidence was presented at all in regard to these Rules. All the Rules now in question were declared facially void for overbreadth before the Board had any opportunity to apply them to any students. It should also be obvious that many of the new Rules, such as those subjecting students to punishment for distributing anonymous literature or literature causing a significant disruption in school, were Rules which formerly were not necessary because schools, under the original Rule, were given unlimited discretion in approving all materials prior to their distribution in school. In spite of this, there is evidence in the record supporting the nine problems taken from the Board's Brief. Dr. Kalp's testimony was not simply an abstract speculative opinion, but was based on his lengthy experience and expertise in school matters.

The second quotation from Petitioners' Brief discussed by Respondents concerned the interest of the Board in protecting the safety and well being of its students and identifying students who abuse their freedoms and harm others through the use of fraud, libel and obscenity. This was a major reason for the Board Rule prohibiting the general distribution of anonymous literature in its schools. This Rule, of course, was never applied to Respondents and thus, contrary to their statement that the Board was charging the Respondents with fraud, no such charge was made or implied. There was, however, evidence concerning an article in the *CCC* containing false statements about a high school coach, which statements were considered to be quite serious by the Administration and thus were investigated and found to be totally false. (App. 53-55, 48-49) The obscene language found in the *CCC* was the major reason for

its disapproval by the Administration. The Board maintains that the identification Rule is necessary because it is the only reasonable means to identify those responsible for these abuses. The concept of anonymity really has no proper place in the schoolhouse and students have always been required to identify themselves on request by any school official or teacher, regardless of whether they are distributing literature or not.

Respondents' suggestion that other administrators or school officials did not share Superintendent Kalp's belief that the *CCC* was harmful to minors and its distribution at school would impede important educational goals is contrary to the evidence. Mr. Potter did not disagree with Dr. Kalp's decision or the reasons for it and his statement was taken totally out of context by Respondents. The Court is referred to the affidavit signed by 220 parents and the high school principals as to the harmful effect of the *CCC*. (App. 63-64) No contrary affidavits were offered.

C. MINORS V. ADULTS. IS IT CONSTITUTIONALLY PERMISSIBLE FOR SCHOOL AUTHORITIES TO IMPOSE GREATER RESTRICTIONS ON MINORS THAN THE STATE COULD CONSTITUTIONALLY IMPOSE ON ADULTS WITHOUT VIOLATING THE FIRST AMENDMENT?

The third crucial factor to be considered by this Court in its determination of the extent of constitutional restrictions upon the power of the Board to adopt Rules governing student behavior is the age of the students involved. The Board's position is clear and well supported: Schools may impose greater restrictions upon minors than the state could constitutionally impose on adults without violating the First Amendment. Children have always been both protected and controlled in our society for obvious reasons. Since the Rules in question apply to minors, not

adults, this factor cannot be ignored. Thus Respondents' total failure to devote one line in their 113 page Brief in reply to this crucial issue is most significant.

D. COURT'S INJUNCTION IS OVERBROAD.

Another crucial question closely related to the overbreadth issue is the invalidity of that part of the District Court's order which permanently enjoins the Board from the promulgation or enforcement of any Rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material. . . ." (Pet. Cert. 14A) It seems unlikely that the Court of Appeals was unaware of the paralyzing effect of this injunction, which it upheld, since it was both briefed and argued by Petitioners in the Seventh Circuit. However, both the Court of Appeals and Respondents completely ignored and failed to respond to any of the Board's objections to this unwarranted injunction. Thus the arguments and reasons advanced by the Board for vacating this broad injunction remain completely undisputed.

Since this injunction clearly violates the principles announced by this Court in *Tinker* and several other decisions (Pet.Br. 47-48) and prohibits the Board from disciplining students who cause riots and other significant disruptions at school, Petitioners hope that this Court, realizing the significance of Respondents' silence and the serious consequences and invalidity of this injunction, will vacate it. This is particularly essential because the Board is now required by statute to adopt written Rules before it may discipline its students and this injunction destroys the legal capacity of the Board to adopt such Rules.

ARGUMENT II

A. SALES AND SOLICITATIONS.

1. *Board May Prohibit Use of School Property for Non-School Purposes.*

The Board stated five important reasons for upholding its Rules regulating sales and solicitations in the Indianapolis Public Schools, the first being the power of the Board to prohibit the use of its schools for non-school purposes. Sales and solicitations in school for the personal profit of students is clearly a non-school activity. In support of this basic principle, five cases were cited, among them *Adderley v. Florida* (1966), 385 U.S. 39, 47. Respondents ignored the other cases cited by the Board and attempted to distinguish *Adderley* which upheld defendants' convictions for trespass for refusing to leave an area outside of a jail. Contrary to Respondents' assertion, the applicability of *Adderley* to the instant case does not depend on equating a jail and a school, particularly since the trespass occurred on the grounds outside the jail. Although the Court did distinguish these grounds from public streets and parks, the ruling of the Court that ". . . the state has the power to preserve the property under its control for the use to which it is lawfully dedicated" was clearly not limited to jail property. This rule has been applied to many types of government institutions and property and thus this decision is most relevant to the case at bar. Surely a school board has as much right to regulate the use of school corridors and classrooms and prohibit their use for non-school purposes. Respondents cited no cases to the contrary.

The cases and arguments of Respondents are in no way pertinent to the issue of whether the Board regulation of sales and solicitations in school violates the Constitution. For example, *Grody v. State* (1972), 257 Ind. 651, 278 N.E. 2d 280, invalidated a statute making it a crime for *any person* to refuse to leave the premises of any educational

institution when requested *regardless of the reason therefor.* Petitioners fail to see what possible comparison could be made between this penal statute and the Board Rules on sales and solicitations. Although the Court did state that the ends of education "require an assured freedom to speak and publish ideas and to assemble to discuss them . . ." the remainder of that quotation which Respondents omitted said that such freedom "must be in a manner consistent with the orderly use of the property for its dedicated purposes." (278 N.E.2d at 284) This is, of course, a significant omission since the Board has maintained that the sales and solicitation Rules prevent obvious problems and accomplish valid educational goals and thus said Rules are consistent with the orderly use of school property for its dedicated purpose.

Respondents imply (Resp.Br.49) that the Board would be justified in prohibiting commercial activities on school premises but that the *CCC* was not a commercial activity because it did not make a profit. Whether a business or commercial activity realizes a profit is totally immaterial to its characterization as commercial, but in fact, the evidence revealed that a profit was made on the sale of one of the issues of the *CCC* (Tr. 161). Respondents' testimony also revealed that the students hoped to realize a profit by selling the *CCC* to any person interested in the general community as well as at school. (Tr. p. 90; 244-245).

Respondents' comment (Resp. Br. 50) that the effect of the Rules on sales and solicitations is to limit student communication by confining expressions only to those receiving approval is false and misleading. There is absolutely nothing in either of these Rules concerning the content of any publication or the type of product sold in the schools. The Board and Superintendent have always been concerned about the effect of sales and solicitations on students and should not be forced to allow school property to be used

for any commercial purpose. The Board should have the right to prohibit solicitations and sales at school regardless of the purpose, product or person involved.

The cases cited by Respondents (Resp.Br. 51-52) are readily distinguishable from the case at bar. For example, *Grosjean v. American Press Company* (1935), 297 U.S. 233, invalidated a state license tax on newspaper publishers with a certain circulation for the privilege of selling and charging for ads in said newspapers. Since no tax is involved in the case at bar and no attempt has been made to restrict sales and solicitations by students in the community-at-large, this case is not relevant to the issue of whether the Board has the power to regulate such non-school activities on its property. A criminal ordinance in *Lovell v. Griffin* (1937), 303 U.S. 444, prohibited any distribution (whether free or sold) of any literature of any kind within an entire city without a permit and the Court noted that the law was not limited to literature that was obscene or offensive to public morals or that advocated unlawful conduct. This ordinance can scarcely be compared to any Rules in the case at bar because it contained absolutely no restrictions in its application.

Near v. Minnesota, ex rel. Olson (1930), 283 U.S. 697, like the other cases cited above, did not involve a regulation of sales of newspapers and other products on certain types of property but involved a prior restraint upon publications and thus is not relevant to this particular issue. Contrary to Respondents' assertion, absolutely no prior restraints are involved in either of the Board's Rules on sales and solicitations. Respondents' claim that *Time v. Hill* (1967), 385 U.S. 374, supports their argument that the sale of student newspapers at school is protected by the First Amendment is totally inaccurate. *Time* did not involve schools, student publications, or sales and solicitations, but

was an action for damages under a statute protecting the right of privacy.

Murdock v. Pennsylvania (1942), 319 U.S. 105, 87 L.Ed. 1292, also involved a criminal ordinance imposing a license tax for the privilege of soliciting within a city. The constitutionality of this tax as applied to those selling religious publications was the only issue in this case. The Court noted that the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult, but the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated," does not transform evangelism into a commercial enterprise. The majority concluded that the activity was religious rather than commercial, since petitioners were not selling their literature in the sense that ordinary merchandise was sold, but used the money and contributions received toward petitioners' activity, which was charitable and from which there was no commercial gain. The selling activities were merely incidental and collateral to their main object which was to preach and publicize religious doctrines. The facts and issue in *Murdock* are quite different from those in the case at bar. Indeed, this Court noted that in *Jamison v. Texas* (1942), 318 U.S. 413, 417, it held that the "state can prohibit the use of streets for the distribution of purely commercial leaflets, even though such leaflets may have a civic appeal or moral platitude appended."

In conclusion, none of the cases cited by Respondents are relevant since none suggest or imply that an elementary or secondary school could not regulate or prohibit sales, solicitations, or any commercial activity on school property during school hours.

2. *Rule Upheld If Reasonable Basis For It.*

The Board cited several cases supporting its second argument that the Rules on sales and solicitations should be

upheld since there is a reasonable basis for them. In reply to this argument, Respondents, ignoring these cases, contended that the Rules are not reasonable because there was no evidence that sales and solicitations at school would materially and substantially disrupt the school. Yet there was no evidence that the students attempted to sell or solicit funds for more than a few copies of the *CCC* on school property. The students testified that many copies were given away and they tried to distribute it anywhere they could, including the general public beyond the schoolhouse gates. Even if 100 copies were sold over a period of time in an Indianapolis high school such as Tech, with over 5,000 pupils, this could scarcely be characterized as a general distribution. Thus Respondents have attempted to paint a picture which distorts reality.

Respondents do not deny that the acts of selling or soliciting money would distract students from their assigned tasks in class or delay passage between classes. Although a few sales or solicitations by students might not substantially interfere with the orderly operation of the entire school, this alone, is not a true test, for if it were, the enforcement of any general Rule would rest on the effect each individual case had on the educational process. Turmoil and controversy would then be invited and such a variable individual criterion would destroy the meaning and application of the constitutional guarantee of equal protection. Once the gates are lowered, or the standards destroyed, it is reasonably probable that students would be pestered to buy all sorts of items, all to the detriment of quality education. Thus, the reasonableness of a Rule does not depend upon the effect of its violation by one or a few students. Many courts have recognized this fact. For example, the Sixth Circuit in *Gfell v. Rickelman* (6th Cir., 1971), 441 F.2d 444, expressly rejected the contention that the reasonableness of the rule (on hair length) should be judged only in relation to the activities of a particular student. "Rather reason-

ableness is to be assessed in the context of the *general purposes* of the school itself." (441 F.2d at 447).

The Indianapolis Public Schools have always had a Rule prohibiting sales and solicitations at school without prior approval. Such a Rule has been deemed essential for the reasons stated in Petitioners' Brief. Respondents' mockery of any legitimate interest or goal of the school such as the need to create and maintain an academic atmosphere and order reveals that these students do not believe that any regulation of their conduct could be justified under any circumstances.

They argue that even if the sales Rules are reasonable, they are still unconstitutional for overbreadth, citing *Broadrick v. Oklahoma* (1973), 413 U.S. 601, as support. (Resp. Br. 54) It is interesting that they should cite this case since this Court in *Broadrick* upheld the enforcement of a statute which prohibited state employees from soliciting or receiving political contributions among their coworkers. Even though the *Broadrick* statute conceivably could have been applied unconstitutionally to others not before the Court, this Court rejected the application of the overbreadth doctrine in this manner and noted that the overbreadth which may exist should be cured through a case by case analysis.

Respondents also relied upon two decisions of the Seventh Circuit, neither of which even raised the issue of sales or solicitations in school.[1]

The Board's reliance upon *Cloak v. Cody* (N.D.N.C., 1971), 326 F.Supp. 391, and *Katz v. McAulay* (2nd Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933, was not misplaced as Respondents suggest. (Resp. Br. 37-39, 55) Both

[1] *Scoville v. Board of Education of Joliet Twp. H.S. Dist. 204* (7th Cir., 1970), 425 F.2d 10, and *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355.

of these decisions upheld rules prohibiting sales and solicitations at school which were substantially similar to those in the case at bar. In *Cloak* the court held that the plaintiff student was not entitled to damages or an injunction against the board for enforcing the rule prohibiting all sales and solicitations at school. The student's appeal was dismissed as moot because he had graduated and it was not a class action.

Respondents attempt to distinguish *Katz* from the case at bar in two respects. First, the leaflets freely distributed by students in *Katz* contained a request for funds to help pay for legal expenses of certain defendants then on trial. Although the purpose of the solicitation was different from the instant case, this factor was immaterial since the board rule subjected students to expulsion for "soliciting funds from the pupils in the public schools" for any purpose. However, Respondents' emphasis of the purpose of the solicitation as a factor to be considered is an apparent recognition of the Board's right to regulate certain sales and solicitations at school. The second distinction was Respondents' claim that the leaflet in *Katz* was prepared by non-students although this was never explicitly stated in the opinion. Nevertheless, a leaflet prepared by non-students also would have violated the Rule which was upheld. Elsewhere in their Brief, Respondents argue that it is immaterial who writes the material that students seek to distribute. (Resp. Br. 66-68)

The specific sales Rule on literature (Section 1.3.1.5 of Rule 11.05) was not written, as Respondents suggest, for the purpose of preventing any distribution of non-official student publications such as the *CCC*. Obviously, newspapers and other publications are covered by Rule 11.06 which prohibits sales of merchandise and solicitations for any cause at school. *People v. Passafume* (1940), 22 N.Y.S. 2d 785 recognized that newspapers are "merchandise" and

that the First Amendment was not designed to confer special privileges upon persons engaged in the publishing business. The Court also noted that the fundamental difference between the regulation of the business of selling goods and interference with the free distribution of printed matter was recognized by this Court in *Schneider v. Town of Irvington* (1939), 308 U. S. 147; 84 L.Ed. 155. Also *Breard v. Alexandria* (1951), 341 U.S. 622, 95 L.Ed. 1233, which upheld a criminal ordinance prohibiting solicitations of magazine subscriptions in the city without a license, has never been overruled. Surely the Board has a greater right to regulate solicitations on its own property than the city has to regulate solicitations on private property as was permitted by this Court in *Breard*.

The main difference between the original and present general Rule (11.06) on sales and solicitations is that the former prohibited any sale or solicitation at school without the Superintendent's prior approval and the latter permits no prior restraints. Since the Board's original Rule prohibiting all sales and solicitations had been in existence for many years it is unfair to suggest that the amended Rule was adopted to suppress the distribution of literature. Because the District Court ordered the Board to amend its Rules due to the Court's disapproval of any prior restraint and because the approval of some sales or solicitations would subject the Board to charges of discrimination, Rule 11.06 was amended to its present form. Although it was unnecessary to adopt an additional specific Rule on sales of literature, Section 1.3.1.5 of Rule 11.05 was added simply for clarification and so that all regulations affecting literature could be found in a single resolution. If Rule 11.06 is constitutionally applicable to sales of literature, then it should not be unconstitutional to also specifically refer to such sales in Section 1.3.1.5. This is certainly not a case where the Board has prohibited just the sale of literature,

while allowing other products to be sold in the schools. The general Rule was held overbroad presumably because it could be applied to literature. But when a "writer offers his works for sale, he engages in commerce like any other merchant and becomes subject to reasonable, necessary regulation." *People v. Passafume* (1940), 22 N.Y.S.2d at 785, 788.

This Court has recognized that freedom of the press should not be twisted into a license to escape commercial regulations affecting persons engaged in other business pursuits and has held that the press has no special immunity from regulations applicable to business in general. *Mabee v. White Plains Publishing Co.* (1946), 327 U.S. 178, 184. Thus the Court of Appeals, while recognizing the power of the Board to prohibit commercial activities on school premises erroneously assumed that persons selling literature must be accorded special privileges.

B. DISRUPTION RULE.

Section 1.1.1.3 of Rule 11.05 provides:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis Public Schools, or injury to others."

Respondents did not dispute the validity of any of the ten major arguments advanced by the Board for upholding this Rule. Instead Respondents state three invalid reasons for declaring this Rule void on its face for vagueness and overbreadth. First, they allege that this Rule requires student literature to be reviewed by the Board prior to its distribution, which simply is not true. In fact this Rule amended the disruption Rule requiring prior review. The prior restraint Rule (discussed in Question 4) was ordered

amended by the District Court because it believed that any prior censorship of student literature was unconstitutional. None of the amended Rules examined in this second question presented for review constitute prior restraints on student literature. Respondents' repeated claim that all of these Rules require prior review reveals that they do not understand the difference between prior and subsequent restraints.

Prior censorship means the official power to examine printed matter and films before they are distributed in order to approve or reject the content thereof. *See, e.g., Burstyn v. Wilson* (1952), 343 U.S. 495, 96 L.Ed. 1098. The disruption Rule, as well as the other Rules examined under this question, do not permit any prior censorship since they do not require that students submit materials to any person prior to distribution. No prior screening or suppression of the contents of any literature is permitted under these Rules.

However, the Rules, including the disruption Rule, do provide for *subsequent* restraint or *punishment* which refers to the imposition of a penalty after distribution. This second amendment contains a penalty section (1.6) which provides that if students violate any provision of the Rules, disciplinary action may be taken against them. If either suspension or expulsion,[2] the maximum punishments allowed under the Rules, is deemed necessary, the school is required to follow the procedural due process requirements of a state statute (*Public Law 162, Burns' Ind. Stat. Ann., Sec. 28-5358, et seq.*). This statute was adopted and implemented by Board resolution 1030 (Exhibit C of Additional Paragraph of Answer, filed October 12, 1972). The elaborate safeguards found in this statute and resolution insure that every student will receive due process before being suspended or expelled from school.

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[2] Expulsion is any suspension from school attendance exceeding 5 days.

Respondents' deliberate obliteration of the important distinction between prior and subsequent restraints is revealed also by the cases cited to support the invalidity of these Rules. For example, *Near v. Minnesota, ex rel. Olson* (1931), 283 U.S. 697, cited several times by Respondents did involve prior restraints. *Near* examined a statute, the object of which was not punishment, but suppression of the offending newspaper. This Court, recognizing the difference, stated that the freedom of the press guaranteed by the First Amendment ". . . has meant principally, but not exclusively, immunity from previous restraints or censorship . . . but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity." (283 U.S. at 714, 716).

Respondents' reliance on *New York Times v. United States* (1971), 403 U.S. 713. also reveals its confusion. In the *New York Times* case, the United States government sought to enjoin publication by the Times of the contents of a classified study concerning Viet Nam. Publication was prevented and the case was decided solely on the issue of whether the prior restraint was permissible and not whether subsequent punishment, after publication, would be justifiable. The Court noted that although the government could not justify the suppression or prior censorship of the sensitive documents, this did not mean that newspapers would be immune from criminal action if they did publish this information. It said:

> "Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way." 403 U.S. at 733.

Thus, this Court has not only recognized the distinction between prior and subsequent restraints, it has also approved the basic principle that one may be penalized for publishing some words or information which constitutionally may not be suppressed by prior censorship.

The second and major argument of Respondents examines a single word in the disruption Rule-the term "injury" and suggests hypothetical impermissible applications of this word. For example, they suggest that the Board could expel a student if he wrote an article which was critical of class scheduling, assuming that this would hurt the feelings of someone and thus injure them. This entire argument is particularly unmeritorious because the *CCC* did in fact contain many derogatory, critical articles, and no disciplinary action was taken against students due to these articles. The record clearly reveals that distribution of the *CCC* was prohibited because of the obscenities and indecencies contained therein.

Petitioners' Brief (42-44) sets forth compelling reasons for prohibiting students and courts from indulging in this type of facial examination of Board rules. If the phrase "injury to others" was the only objection to this Rule, the Board would not hesitate to delete it, but the courts below objected to the use of virtually every word in this Rule and apparently believe the Board has no right to discipline students for causing significant disruptions at school. (Pet. Cert. 21A) The Board concludes that it would be impossible to reword this Rule so as to satisfy the Court of Appeals. Judge Christensen, in his dissent, was correct when he said the Rule was neither overbroad nor too vague and perceived no determinative difference between this Rule and the more acceptable rewording suggested by the District Court. (Pet. Cert. 30A)

The third argument of Respondents was that the Board failed by any affirmative evidentiary showing to justify

imposition of the disruption Rule. Again, Respondents ignore the fact that the Rules in question were formulated pursuant to Court order *after* the hearing, were never imposed on the students or the *CCC*, were not declared unconstitutional as applied to anything, and instead were declared void on their face. Thus, the numerous comments throughout the Respondents' Brief that there was no evidence to justify imposition of the various Rules, is totally irrelevant and deliberately misleading. The issue in this case is not the validity of the Rules *as applied* to the *CCC*, but whether the Rules are *facially void* for overbreadth.

Respondents have painted a distorted picture of students distributing vast quantities of many copies of the *CCC* in numerous high schools over a period of two years, claiming that this general distribution caused no incidents of any kind. In fact, the record and reality of the situation is quite different. There was minimal distribution at two high schools out of eleven. There was no evidence that distribution occurred at any other school, nor was there any evidence that distribution at the two schools was more than minimal. In addition, evidence of disruption of the *CCC* is immaterial to the question before this Court, *i.e.*, whether the disruption Rule is void for vagueness and overbreadth.

C. SECTION 1.1.1.4 (NON-STUDENT AUTHORSHIP); SECTION 1.3.1.6 (ANONYMITY).

1. *Literature Not Written By Students or School Employees.*

Section 1.1.1.4 of Rule 11.05 provides for punishment of any student who distributes in school any literature "not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

The only purpose of Rule 1.1.1.4 was to prevent outside organizations or persons from accomplishing indirectly what they are prohibited from doing directly, that is, selling or distributing literature in the schoolhouse. For example, commercial organizations easily could hire students to distribute flyers advertising their products. This Rule does not have the purpose or effect, as Respondents allege, of imposing "orthodoxy over the classroom," or regulating the content of student publications. Since students remain free to express themselves or to use or quote the ideas of others, the First Amendment rights of students have not been violated.

This Rule does not allow any prior review by school officials or the Board of student literature and thus does not constitute a prior restraint. In fact, the Rule imposes no restraint upon students' expression. Thus, most of Respondents' statements and quotations are totally irrelevant. The cases cited as support by Respondents do not even concern an issue comparable to the one in question. The issue is not whether outside authors could write articles or books which might be worthwhile for students to read, but whether the Board must allow their sale or distribution in the schoolhouse. In fact most were criminal cases. For example, *Sweezy v. New Hampshire* (1957), 354 U.S. 234, did not involve student expression or distribution of literature but simply reversed a contempt conviction because the Attorney General lacked legislative authorization to obtain the type of information demanded from the witness. *New York Times v. United States* (1971), 403 U.S. 713, involved whether an injunction and prior restraint against a newspaper was valid and thus is not pertinent. Respondents' suggestion that the Board is opposed to student exposure to ideas and information written by non-students is ridiculous. If this were true, school libraries filled with articles and books written by non-students would not exist. However, to prohibit students from selling or

distributing in school, materials written by non-students or outside organizations is both essential and reasonable to prevent disorder and interference with school functions. It is the duty of the Board to prevent the problems that would result from permitting the large captive audience of immature minds to be distracted from their tasks by such outside influences.

The Court's decision that this Rule is void for overbreadth places the Board on the horns of a serious dilemma. A more narrow Rule which would permit students to distribute *some* outside materials in school would subject the Board to charges of discrimination or a denial of equal protection. Such a Rule would also create practical administrative problems and would probably necessitate a system of prior approval. The present Rule avoids these problems and is not based on content or arbitrary numbers. The only other alternative is no regulation at all. To allow any and all outsiders to have their materials distributed or sold by students in school would be comparable to opening a floodgate. Serious delays, distractions, disruptions and other problems would result. Obviously it is necessary to draw the line somewhere and the Rule in question is reasonable and avoids the pitfalls and problems of the only other alternatives.

2. *Disclosure of Publication Participants.* Section 1.3.1.6

Section 1.3.1.6 of amended Rule 11.05 provides: "No distributable literature shall be distributed by any student in any school unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

Contrary to Respondents' assertion, this Rule does not impose upon student publications such as the *CCC* dictatorial prior restrictions which are absent from daily newspapers such as the *Indianapolis Star*. This Rule imposes no

prior restraints whatsoever. Any comparison of the *CCC* to national magazines and daily newspapers is like equating oranges and apples since these daily publications, unlike the *CCC*, display policies and accept responsibilities not evident in the *CCC*. In contrast to the national publications listed by Respondents, the *CCC* is written by children, has no editors and no person(s) in charge and its policy is to publish anything sent to it, as is, with absolutely no verification or editing. It would also be impossible to hold the *CCC* responsible for libel or other abuses of freedom of the press.

Since the present Board Rules allow students to distribute these unedited publications at school, it is incredulous to argue that the Board should have no means to identify those responsible for abuses of freedom of the press. Since no person or organization has any responsibility for this unedited paper, there is obviously no other means for the Board to identify and fix responsibility for fraud, libel, obscenity or other abuses which might appear therein.

Most of Respondents' arguments under this issue are misplaced, inaccurate or irrelevant. A few comments seem appropriate. How this identification Rule is certain to imperil creative writing, as Respondents allege, is a mystery to the Board. It is also not true that the Board argued that its duty was to shield students from advocacy or promotion of expressions of feelings with which it does not wish to contend. (Resp.Br. 69) Indeed, Respondents' entire discussion of the alleged right to advocate illegal action or force at school seems totally misplaced. It is not pertinent to the issue of anonymity.

Respondents also inject an entirely new issue into this case by alleging that the phrase "distributable literature" is both vague and overbroad. This was never alleged or ruled upon in either court below.

Petitioners also fail to see the relevancy of the fact that many *CCC* articles disclosed the first name of its author.

Even if the author of every article to date were identified, this would not demonstrate that such Rule was unnecessary for the future.

Respondents' claimed right to anonymity at school can be compared to the journalist's claimed privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence. This Court has already decided that there is no such constitutional privilege. *Branzburg v. Hayes* (1972), 408 U.S. 665, 33 L.Ed. 2d 626.

The cases cited by Respondents are not valid support for holding this Rule unconstitutional. Most concern criminal statutes which do not even mention or require identification of any person.

For example, both *Rosenbloom v. Metro-Media* (1971), 403 U.S. 29, and *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, concern the evolution of constitutional limitations upon state libel laws and whether it is necessary to prove under certain circumstances that the libel was uttered with knowledge that it was false or with reckless disregard of whether it was false or not.

Bates v. Little Rock (1960), 361 U.S. 516, reversed convictions of defendants for their refusal to list the names of the NAACP. The evidence revealed that public identification was followed by harrassment and threats of bodily harm. When state action threatens significantly to impinge upon constitutionally protected freedom the Court said it must determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. The Court found no relevant correlation between the power of cities to impose occupational license taxes and compulsory disclosure and publication of the membership list of the NAACP. The NAACP also would not fall within any of the occupation classes for which a license is required or a tax payable. In the case

at bar, there was absolutely no evidence that any harrassment or bodily harm did or would result from disclosure of contributors to an underground newspaper. The Board Rule also provides the only reasonable means to identify those responsible for abuses.

D. DISTRIBUTION DURING CLASS HOURS.

Section 1.3.1.1 provides that students shall not distribute literature in school "while classes are being conducted in the school." Since this Rule was adopted after the hearing there is nothing in the record with respect to class schedules or the hours and number of classes throughout the school day in the Indianapolis Public Schools.

Respondents attempt to take advantage of this fact by contending that this Rule is overbroad because it would prohibit student distribution of literature in school if a single class was being conducted somewhere in the school and thus "would effectively prohibit any distribution of literature at any time any persons were present at a . . . school." (Resp.Br. 78, 81) This argument is not only absurd, it is a deliberate misstatement, particularly in view of the fact that the principal must designate certain areas in the school for distribution of literature under Section 1.3.1.2. (App. 23)

The Board submits that Respondents are well aware and this Court can take judicial notice that schoolhouses consist primarily of classrooms which students are required to attend. It would be a strange school indeed which, when filled with students and teachers, only had one or a few classes in session. All students in elementary and secondary schools have schedules which require them to be in a class or other supervised learning activity every period of the day. To suggest that only some students must be in classes while others may run around the school free is preposterous.

Since the basic purpose of Indianapolis schools is to conduct classes and require that students attend them, it is not unreasonable to prohibit any other activity during those classes which would interfere with the schools' proper function and legal duty. To prevent distribution by students in the school which would either delay or interrupt classes is the only purpose and effect of this Rule. Distribution before, after, or between classes clearly is permissible under the Rule.

Respondents' demand that the Board must introduce evidence to prove six of Respondents' justifications for this Rule is unwarranted. All but two of these demands concern proof that distribution disturbs or disrupts classes. Yet it should be obvious that if students who are required to be in class are distributing literature instead, then either they are delaying or disrupting their own class or they are cutting their class. Respondents demand is also unwarranted since there is no evidence that the *CCC* was distributed at any school while classes were being conducted.

The demand for evidence that raising funds for school projects, such as the school yearbook or band, is not disruptive in contrast to the distribution of literature is based on the erroneous presumption that schools allow such solicitations while classes are in session. School projects such as these are one of the functions of homeroom periods set aside for such activities.

The remaining "justifications" assume that students have a right to interfere with other supervised activities such as debates, assemblies, musicals and lunch.

Respondents' statement that it is clear that no other judicial circuit would have permitted this Rule to stand is inaccurate and misleading since no other Circuit Court has been presented with this question. No similar rule was examined in any case cited by Respondents.

In conclusion, this Rule is not void for overbreadth since it is not unconstitutional to prohibit distribution in the classroom or elsewhere in school when students are required to be in a class or other supervised educational activity. This is the only intent and effect of this Rule. The Rule simply accomplishes what the District Court said was permissible—the prohibition of distribution of literature at times and in places where normal classroom activity (defined as organized supervised educational activity) is being conducted. (Pet. Cert. 13A)

ARGUMENT III

OBSCENE, INDECENT LANGUAGE.

1. *The Board Has Not Shifted Its Position.*

Respondents' outrageous claim that there has been a major shift in the Board's position on this issue is a deliberate attempt to distort the record and confuse this Court. The Board's briefs in the District Court, Court of Appeals and this Court reveal that its position on this issue has remained the same—that language found throughout the *CCC* such as "f- - -," "eat shit," awarding points for the number of "freak girls screwed," a blazing headline "ON YOUR ASS" and a cartoon depicting the principal on a toilet and a student eating his shit, render the *CCC* obscene as to minors, and that school authorities can both prevent and punish students for using such language in elementary and secondary schools even if such language is held to be vulgar and indecent but not legally obscene as to minors.

The mere fact that two of the three judges of the Court of Appeals rejected the Board's argument that the *CCC* is obscene as to minors has neither changed the opinion of the Board nor shifted its position as Respondents allege.

The Board believes that an important function of its schools is to teach children to use language properly. If it

permits the distribution of such filthy language in its schools and cannot reprimand and discipline children for writing such four-letter words as are found in the *CCC*, then schools will not be able to accomplish one of their basic responsibilities. Such permission would also encourage children to become "juvenile delinquents" since a state statute defines a "delinquent child" as any boy or girl under 18 years of age who "uses vile, obscene, vulgar or indecent language." *Burns' Ind. Stat. Ann., Sec. 9-3204 (13); I. C. 31-5-7-4.*

The label attached to such language is immaterial so long as schools are permitted to attempt to control its use by children in school either through prior or subsequent restraints. It is incredible that the right of schools to maintain a basic level of decency in the use of language by children at school should even be questioned, let alone denied. There can be no doubt that such basic decency cannot be maintained if school officials must allow children to write and distribute such obscene, vulgar language throughout the school because children learn by example.

2. *Board Has Promulgated Rules Prohibiting Indecent Language.*

Respondents' assertion that "the Board has promulgated no rules which prohibit filthy, vulgar and indecent language" (Resp.Br. 84-85) is rather puzzling since one of the guidelines under its Rule requiring prior approval states that "no material shall be distributed which contains indecedent, vulgar or profane language, cartoons, or pictures." (App. 19) Board Resolution 1030 also permits a student's suspension from school for the use of abusive and/or vulgar, indecent language. (Exhibit C of Additional Paragraph of Answer filed 10-12-72) Thus, Respondents' assertion that the Board has no right to ask this Court to determine its powers to impose either prior or subsequent

restraints on students who utilize such language can scarcely be considered an anticipatory question. It always has been considered by the Board to be the most crucial question in this case, and one which has been thoroughly briefed and argued before both courts below and accepted for review by this Court.

3. *Rules and Decisions Cover Elementary School Students.*

The first time that Petitioners were informed that Respondents considered the proceedings or Board Rules in the case at bar to be limited to high school students was at the oral argument before the Seventh Circuit Court of Appeals. Respondents were there asked about the effect of filthy language upon elementary school students. In response to this question, they replied that this case involved only high school students. This came as a distinct surprise to Petitioners, since all the Rules in question undoubtedly and clearly apply to all students in the Indianapolis Public Schools, including those in the elementary schools. The lengthy briefs filed by Petitioners in the courts below reveal that elementary students were considered to be an important part of this case. Respondents never denied this fact. The injunction of the District Court which was upheld by the Court of Appeals and all of the Rules in question apply to both elementary and secondary schools. Judge Christensen in his dissent stated:

> "That at oral argument 'plaintiffs conceded that their case was limited to the application of the rules in high schools' does not seem to me a sufficient reason for our failure to hold as to elementary schools of all places that the trial court's decision involved error. Appellees should not be permitted to waive the contentions of appellants, who have argued here both overbreadth and invalidity of the injunction." (Pet. Cert. 31A)

Respondents' contention seems even more bizarre in view of the fact that Respondents at no time in the proceedings or briefs below claimed that their arguments were limited to high school students or conceded that the Board Rules constitutionally could be applied to elementary students. Although the student plaintiffs were indeed high school students, their Complaint stated a class action on "behalf of themselves and all others similarly situated."

It is not incumbent upon the Board to show any evidence of distribution of the *CCC* to elementary students since actual distribution is totally irrelevant to the issue of the facial validity of said Rules which were never applied to students either in elementary or secondary schools. These Rules were declared facially void and Respondents would be the first to complain and demand punitive damages for lack of good faith on the part of the Board if it attempted to apply the Rules to elementary students.

The Court of Appeals noted that the District Court's injunction is broad enough to cover enforcement of the Rules at elementary schools. (Pet. Cert. 29A) When the Court upheld the injunction in its entirety and the facial invalidity of said Rules, it implicitly held that these Rules constitutionally could not be applied to any students despite its statement that "it had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools." (Pet. Cert. 29A)

4. *CCC Is Obscene as to Minors.*

a. *Language of CCC is Erotic, Sexually Explicit, and Appeals to Prurient Interests of Minors.*

For Respondents to state that the record contains no evidence, not even speculative testimony, indicating that any of the material in the *CCC* is patently offensive or appeals to the prurient interests of minors is astounding in view of the fact that the only evidence in this case, except

a few self-serving statments of some of the students, reveals that the *CCC* is obscene as to minors. The Court is referred to Superintendent Kalp's statements (App. 11-17) and an affirmation signed by the principals of Indianapolis high schools and some 220 parents (App. 63-64) which reveal that, applying local standards, certain material in the *CCC* indeed meets all of the elements of obscenity. Indeed, even a student plaintiff referred to "the obscene matters that were involved" in the *CCC*. (App. 39).

b. *Respondents' Cases are Distinguishable from Case at Bar.*

Although Respondents cite a number of decisions which illustrate an increasing immunity from *criminal* sanctions for filthy expressions when used by adults, these rulings by no means legitimatize the sale and distribution of such obscenities to minors in the schoolhouse.

Respondents' attempt to equate the findings in *Bazaar v. Fortune* (5th Cir., 1973), 476 F.2d 570, and the case at bar is misleading and an apparent attempt to divert the Court's attention from the fact that we are, in the instant case, concerned only with minors in elementary and secondary schools.

Respondents cite two high school cases, but neither decision stands for what Respondents claim it does. *Vought v. Van Buren Public Schools* (E.D. Mich., 1969), 306 F. Supp. 1388, concerned the expulsion of a high school student for possession of a single copy of *The Argus*, a 24 page tabloid-type publication containing serious articles written grammatically, which publication apparently contained the word "f---." The possession by the student of this publication on one occasion violated the school's policy against possession of obscene literature. The Court, in reversing the expulsion, noted that the same words were found in the book *Catcher in the Rye*, which the plain-

tiff student was required to read in the 10th grade, and which is now required reading in the 9th grade at said school. This book used the same word six times. This word was also found in an issue of "Harper's" magazine found in the school library. The board objected to the subjection of the student to a double standard whereby he was required to read literature containing the word which appeared in the publication "Argus," the mere possession of which, on one occasion, was the sole reason for his expulsion. The Court stated that this inconsistency was so inherently unfair as to be arbitrary and unreasonable, constituting a denial of due process. Thus, the facts and issues in this case are entirely different from those of the case at bar. In *Vought* the Court said that the board rule requiring the expulsion of any student found with obscene literature in his possession did not violate the First Amendment. The rule was not declared unconstitutional. Indeed, the Court said that the school's obligation "to prescribe and control conduct in the schools" must be held to encompass the promulgation of rules concerning the extent to which and the conditions under which obscene materials may or may not be properly on the school premises. It is highly significant that the double standard which was the basis for the Court's decision in *Vought* is not present in the case at bar. Thus, this case, instead of supporting Respondents' position, is actually more supportive of Petitioners' position.

Keefe v. Geanakos (1st Cir. 1969), 418 F.2d 359, was cited by Respondents as perhaps the strongest case on the "earthy word" issue. In this action by a tenured high school teacher to enjoin the school from discharging him for reading and discussing the term "bastard" contained in a magazine with high school seniors, the Court, although agreeing with the school that what is to be said or read to students is not to be determined by obscenity standards

for adult consumption, granted the injunction pending a decision on the merits. The Court found that some measure of public regulation of classroom speech is appropriate, but the circumstances of the utterance must be considered. There was absolutely nothing in this case about the use of this term by students in the high school or whether such use could or could not lead to punishment of students. Thus, this case does not stand for the proposition contended by Respondents that the use of said word is not an adequate basis upon which to punish students. (Resp.Br. 102)

Although the Board disagrees with the majority in *Papish v. University of Missouri* (1973), 410 U.S. 667, this case involved *adults* at a university, the environment of which is substantially different from that found in any elementary or secondary school. It should be obvious that rules which may be unacceptable on a university campus may be absolutely essential in elementary and secondary schools.

Respondents also attempt to paint an erroneous picture when they imply that expulsion is the only action that could or would be taken against students who violate any of the Board Rules. Expulsion is the last resort of any school official and the penalty section of the Rules allows many other types of discipline to be taken against a student for violation of the Rules, ranging from a simple reprimand to expulsion from school for a limited period.

Contrary to Respondents' assertion, the Board is not asking this Court to write an acceptable "obscene as to minors" rule for it. The validity of the Board's obscene as to minors Rule is not an issue before this Court since it was upheld by the District Court, which holding was not appealed by Respondents. The Board is requesting this Court to hold that under the tests in *Miller v. California* (1973), 413 U.S. 15, the language contained in the *Corn Cob Curtain* is obscene as to minors.

5. *No Double Standard Exists.*

Respondents state that the Board is seeking to establish a double standard by attempting to keep filthy, obscene, four-letter words and cartoons out of the *CCC* when such language "is necessarily already in its schools in innumerable instances, whether in books, magazines, newspapers, locker room conversation, or otherwise." (Resp. Br. 100) Yet, Respondents introduced no evidence at the hearing to prove that the same or similar language was found in the school library or in publications required to be read by students. Even assuming that some students utilize such language in locker room conversations, this is not a valid justification to force school authorities to permit children to write and sell or distribute such language to other children in the schoolhouse. Respondents also assert that to be consistent the Board would have to ban from the schools national newspapers such as the *Wall Street Journal* and the *New Yorker.* Although no evidence was offered to show that said publications are found or used in the Indianapolis school libraries or classes, the Board submits that even if such words could be found in these publications, it does not logically follow that students must be allowed to try their hand at writing the same word(s), and circulating it at school.

In conclusion, while the Board in its Brief has presented many compelling reasons for allowing school authorities to discipline students for using and distributing at school the obscene, indecent language found in the *CCC,* Respondents have failed to state even one valid reason for allowing children to be exposed to such filth in schools which they are forced to attend.

ARGUMENT IV

PRIOR APPROVAL OF LITERATURE.

This issue concerns whether the Board may adopt reasonable Rules requiring prior approval by school au-

thorities of literature before its distribution in elementary and secondary schools and the validity of the Rule adopted by the Board which imposes such prior restraints. This Rule is reprinted at App. 17-20.

Respondents' claim that this issue is being raised for the first time before this Court and was at no time before the trial or appellate court for review is both astounding and puzzling. It is also false. The Board's Brief submitted to the Court of Appeals also raised and thoroughly covered this question (p. 54-60), and requested the Court to declare that the Board has a right to a prior review of materials distributed in its schools and that its Rule of prior review was constitutional. (p. 69-70)

The mere fact that the District Court advised Petitioners that it would tolerate no Rule containing prior restraints and that its amended Rule (prior approval with safeguards) was unconstitutional and further ordered Petitioners to amend that Rule, which Petitioners did, does not remove the validity of this Rule from the consideration of this Court. Nor can the fact that the Court of Appeals ignored the Board's request to determine this issue prevent its consideration by this Court, especially since the injunction and decision of the District Court was affirmed in every respect by the Court of Appeals.

ARGUMENT V

REFUSAL TO APPLY F.R.C.P. 17(c).

Rule 17(a), Federal Rules of Civil Procedure, which provides that every action shall be prosecuted in the name of the real party in interest, is totally irrelevant to this Court's determination of whether the District Court committed reversible error by refusing to apply *Rule 17(c), Federal Rules of Civil Procedure* to the case at bar. The question in the instant appeal is whether the Court complied with the mandate of *F.R.C.P. 17(c).* This question involving

the requirement of a guardian ad litem or other protective order for infant parties should not be confused with the unrelated question of whether a party is the real party in interest—*i.e.*, the person who possesses the right sought to be enforced

Respondents' claim that *Fujishima v. Board of Education* (7th Cir. 1972), 460 F.2d 1355, settles this issue is rather remarkable in view of the fact that questions concerning the plaintiffs' infancy and the necessity of the appointment of a guardian ad litem were not even raised in that case. Respondents' statement that minors are "persons" entitled to constitutional protections is not even pertinent to this question. Infants are also entitled to other protections such as *F.R.C.P. 17(c)*.

Once again Petitioners must object to Respondents' attempt to misstate the record and confuse this Court by claiming that some of the plaintiffs attained the age of 18 years and thus are no longer under any legal disability under Indiana law. During the hearing in the trial court, evidence did reveal that at least three of the named plaintiffs were 18 years old and had graduated from Indianapolis high schools. Because of this discovery the Court ruled that they had no standing to sue in this cause. The remaining named plaintiffs were still IPS students and were under 18 years of age.

Respondents' argument is also highly improper because the Indiana law at the time of this suit defined minors and persons "under legal disabilities" as any person under *21* years of age. *Burns' Ind. Stat. Ann., Sec. 2-4701; I. C. 34-1-67-1.* This statute was amended on April 16, 1973, eight months *after* the hearing in this cause. Thus, this amendment (which lowered the age of minors to include only those persons under 18 years of age) can have no possible relevance to the case at bar. However, it is interesting to

note that the title of this statute reads: "an Act to amend . . . [certain Indiana statutes] as they relate to the age requirements for persons to be parties in civil suits and appear before courts without guardians."

F.R.C.P. 17(b) does provide that the capacity of an individual to sue or be sued shall be determined by the law of his domicile and *Indiana Trial Rule 17(C)* does permit an infant to sue in his own name. But the mere fact that an infant has capacity to sue in his own name in Indiana does not mean that the Court can dispense with the requirement of appointing a guardian ad litem for said infant. The same *Indiana Trial Rule 17(C)* provides:

> "*If* an infant . . . is not represented, or is not adequately represented, the court *shall* appoint a guardian ad litem for him. . . . The court, in its discretion may honor the infant's . . . choice of next friend or guardian ad litem but the court may deny approval or remove a person who is not qualified." (Emphasis added.)

Despite the capacity of an infant in Indiana to sue in his own name, this does not mean that procedural rule *F.R.C.P. 17(c)* is not applicable or controlling. The second sentence of the Federal Rule provides:

> "If an infant does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem."

The situation in the instant case meets the precise condition of this second sentence. This provision "is unconditional, in no way dependent upon the capacity, under the law of the domicile for a party . . . " *68 A.L.R. 2d 754.*

The third sentence of *F.R.C.P. 17(c)* provides:

> "The Court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an ac-

tion or shall make such other orders as it deems proper for the protection of the infant . . . "

Thus, the federal law, in contrast to Indiana law, does not require the appointment of a guardian ad litem in all cases. Nevertheless, although the judge retains some discretion, the Rule is clearly mandatory. The Court is given a choice of either appointing a guardian ad litem or making "such other orders as is deemed necessary for the protection of the infant." In the case at bar, the Court did neither. At the very least he was required to make a *factual judicial determination* that the infant was already adequately protected before he could dispense with the necessity of appointing a guardian ad litem. *Roberts v. Ohio Casualty Insurance Co.* (5th Cir. 1958), 256 F.2d 35.

This case contains an excellent and thorough explanation of *F.R.C.P. 17(c)*. Respondents' attempt to distinguish *Roberts* because the unrepresented minor sought reversal, and money damages were involved, is unmeritorious. The application of the Rule is in no way dependent upon the nature of the claim. Since the law is well settled that infants can seek and achieve reversal of a decision if the Rule is ignored, it would violate the equal protection clause and basic principles of justice to require adults, but not minors, to be bound by a decision in a case where the mandate of the Rule was clearly ignored.

The mandate was clearly ignored in the instant case because the court failed to exercise any of the options required by *F.R.C.P. 17(c)*. (1) There was no judicial finding that the two infant plaintiffs were protected without a guardian, *Roberts, supra;* (2) the court failed to either appoint a guardian ad litem; or (3) make such other order as is deemed necessary for the protection of the infants.

In *Brown v. Ripley* (Fla.App. 1960), 119 So.2d 712, a Florida statute identical to *F.R.C.P. 17(c)* was interpreted

by the court. It held that the following factors are irrelevant and do not excuse compliance with the rule: the fact that the infant defendant was 19 years of age, was represented by able trial counsel, was living away from home in pursuit of full-time employment and the failure of the court to appoint a guardian ad litem for him did not result in any prejudice to his rights or in a miscarriage of justice. The court stated that although there was no contention that had a guardian ad litem been appointed, any defenses otherwise available would have been urged, or any proof different from that presented would have been adduced in support thereof, and it affirmatively appeared from the record that defendant was sufficiently mature to capably assist in the formulation, preparation and presentation of his defense, these factors were likewise impertinent to the issue. The judgment was accordingly reversed.

Unlike the case at bar, in both *Brown, supra* and *Roberts, supra,* the question of whether a guardian ad litem should be appointed or an order entered was never presented to the trial court. Nevertheless, the court held that "failure to follow the rule of procedure here involved is as restrictive upon the power of the trial court to render a decree as where jurisdiction is lacking . . . Affirmative action is necessary to satisfy the rule." (119 So.2d at 717)

In conclusion, the decision should be reversed because the District Court, when properly and timely requested, refused to comply with *any* of the options required by *F.R.C.P. 17(c),* but instead held that this Rule did not apply in a case where constitutional questions were raised.

CONCLUSION

It is therefore respectfully submitted that Respondents have not shown this Court that the decisions below should not be reversed in their entirety. Therefore, Petitioners respectfully request the relief prayed for in their original Brief.

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

No. 73–1347

The Board of School Commissioners of the City of Indianapolis et al., Petitioners, *v.* Jeff Jacobs et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 18, 1975]

PER CURIAM.

This action was brought in the District Court by six named plaintiffs to have declared unconstitutional certain regulations and rules promulgated by the petitioner and to have the enforcement of those regulations and rules enjoined, as well as seeking other relief no longer relevant to this case.* In the complaint, the named plaintiffs stated that the action was brought as a class action pursuant to Rule 23 (a) and (b)(2) of the Federal Rules of Civil Procedure, and further stated that "[p]laintiff class members are all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." At the time this action was brought, plaintiffs were or had been involved in the publication and distribution of a student newspaper, and they alleged that certain actions taken by petitioner or its subordi-

*The named plaintiffs sought expungement from their respective records of certain information and compensatory and punitive damages against petitioner. These prayers for relief were denied by the District Court for failure of proof and no appeal was taken from this decision.

[illegible] ain of its rules and regulations, interfered or threatened to interfere with the publication and distribution of the newspaper in violation of their First and Fourteenth Amendment rights. The respondents prevailed on the merits of their action in the District Court, *Jacobs* v. *School Comm'rs of the City of Indianapolis*, 349 F. Supp. 605 (SD Ind. 1972), and the Court of Appeals, one judge dissenting in part, aff'd, 490 F. 2d 601 (CA7 1973). Petitioner brought the case to this Court, and we granted certiorari, 417 U. S. 929 (1973). At oral argument, we were informed by counsel for petitioner that all of the named plaintiffs in the action had graduated from the Indianapolis school system; in these circumstances, it seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue. The case is therefore moot unless it was duly certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, a controversy still exists between petitioners and the present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review. *Sosna* v. *Iowa*, — U. S. —. Because in our view there was inadequate compliance with the requirements of Rule 23 (c), we have concluded that the case has become moot.

The only formal entry made by District Court below purporting to certify this case as a class action is contained in that court's "Entry on Motion for Permanent Injunction," wherein the court "conclude[d] and ordered" that "the remaining named plaintiffs are qualified as proper representatives of the class whose interest they seek to protect." 349 F. Supp., at 611. No other effort was made to identify the class or to certify the class action as contemplated by Rule 23 (c)(1); nor does the quoted language comply with the requirement of Rule 23 (c)(3) that "[the] judgment in an action maintained

as a class action under the subdivision . . . (b)(2) . . . shall include and describe those whom the court finds to be members of the class." The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initial named plaintiffs prior to the exhaustion of appellate review. Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 73–1347

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[February 18, 1975]

MR. JUSTICE DOUGLAS, dissenting.

In *Sosna* v. *Iowa*, — U. S. — (1975), we found no mootness problem where a named plaintiff belatedly satisfied the durational residency requirement which she had initially sought to attack. Our holding to that effect was based upon three factors which we found present in that case: (1) a certification of the suit as a class action; (2) a continuing injury suffered by other members of the class; and (3) a time factor which made it highly probable that any single individual would find his claim inevitably mooted before the full course of litigation had been run. Applying those principles to the present case, I would hold that an Art. III controversy exists and that the parties are therefore entitled to a ruling on the merits.

This suit was instituted as a class action on behalf of all high school students attending Indianapolis public schools. The record does not contain any written order formally certifying the class, but the absence of such a written order is too slender a reed to support a holding of mootness, particularly in the face of the incontrovertible evidence that certification was intended and did, in fact, take place. At the close of the second day of the proceedings on plaintiffs' application for a temporary restrain-

ing order, the District Judge stated: "I will make a finding that this is an appropriate action, or a class action is appropriate insofar as this controversy is concerned." [1] Later, in his written opinion, he stated that the two named plaintiffs who had not graduated by the time of these proceedings were "qualified as proper representatives of the class whose interest they seek to protect." [2] 349 F. Supp., at 611. At oral argument, moreover, counsel for the Board of School Commissioners stated, in response to a question from us, that there had been a declaration of certification of class action.[3] The findings of the lower court, coupled with the representations of counsel for the petitioners, provide, in my view, a more than ample basis for holding that the first *Sosna* criterion has been met.[4]

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[1] Transcript of Proceedings, August 25, 1972, at 368. This statement was made immediately after a discussion of whether the four plaintiffs who had previously graduated could be "proper representatives of a class," *ibid.*; while tentatively holding that they could not, the District Judge permitted the action to continue in the names of the two plaintiffs who had not yet graduated. *Ibid.*; 349 F. Supp., at 611.

[2] Respondents' complaint alleged that the plaintiff class members were "all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." While there had been a suggestion in the trial court that the class might be broadened to include all Indianapolis public school students, it was conceded in the Court of Appeals that the case was concerned only with the application of petitioners' rules in high schools. 490 F. 2d, at 610. This concession is consistent with the scope of the class as defined in the complaint, and with the District Court's obvious intent in finding the named plaintiffs to be "proper representatives of the class *whose interest they seek to protect*" (emphasis added). I see no serious problem, therefore, in defining the proper and intended scope of the class as approved by the trial court.

[3] Tr. of Oral Arg., at 11.

[4] The Court of Appeals adverted at one point in its opinion to the issue of whether "plaintiffs or class members" would be bound by the judgment, 490 F. 2d, at 603, a reference which might be

The Court today, however, purports to find this case distinguishable from *Sosna* in terms of the adequacy of compliance below with the requirements of Rule 23 (c) of the Federal Rules of Civil Procedure. A review of the record in *Sosna* discloses that the judgment entered by the District Court in that case does not in any way "include and describe those whom the court finds to be members of the class," as required by Rule 23 (c)(3); nor is there anything in the record identifiable as a separate certification of the class in the sense which the Court finds to be contemplated by Rule 23 (c)(1). The District Court in *Sosna*, in its pretrial order, adopted a stipulation of the parties to the effect that the prerequisites for a class action were met, and that there were numerous persons barred by Iowa's residency requirement from having their marriages dissolved; and in its final opinion, the District Court incorporated a bare reference to the fact that the suit was being treated as a class action. 360 F. Supp., at 1183 n. 5. If these two factors alone were sufficient to establish proper certification of the class in *Sosna*, then I am at a loss to see why the factors catalogued earlier are not sufficient to establish proper certification in the instant case.

It is undoubtedly true that many federal district judges have been careless in their dealings with class actions, and have failed to comply carefully with the technical requirements of Rule 23. If we are to embark upon a program of scrupulous enforcement of compliance with those requirements, so be it; the end result may well be to avoid troublesome mootness problems of the sort which arose both here and in *Sosna*. Elementary principles of fairness to litigants suggest, however, that we should be reluctant to throw these respondents entirely out of court

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taken to suggest that that court as well harbored no doubts as to whether the suit was in fact proceeding as a class action.

for their failure to induce the District Court to comply with technical requirements, when those requirements clearly were not being strictly enforced during the pendency of this litigation in the lower courts. And in particular, these principles of fairness suggest that the Court ought to provide a more reasoned explanation than it has given today for the difference in treatment which it has accorded to the appellants in *Sosna* and to the respondents herein.

With respect to the second *Sosna* criterion, it is clear that the Board intends to enforce the regulations struck down by the courts below unless it is flatly barred from doing so. A continuing dispute therefore exists between the Board and the members of the class, unless it can be said with some assurance that there are no class members who desire either to resurrect the "Corn Cob Curtain" or to distribute some comparable "underground" publication. The mere statement by counsel for the Board that the Corn Cob Curtain "is no longer in existence" [5] can hardly be deemed to provide that assurance; to the contrary, the Board's very insistence on the need for enforceable regulations reinforces the likelihood that the desire for unfettered expression will continue to breed clashes between Indianapolis high school students and the Board's proposed regulations. The inference of a continuing controversy is, in my view, just as strong as that which we found sufficient in *Sosna*.

The Court's readiness to find this controversy moot is particularly distressing in light of the issues at stake. True, there is no absolute time factor (such as that in *Sosna*) which will inevitably moot any future litigation over these regulations before it reaches a conclusion; it is conceivable that another plaintiff in a subsequent suit will be able to avoid the trap of mootness which the

[5] Tr. of Oral Arg., at 4, 5.

Court has sprung upon these unwitting parties. In remitting the underlying issues of this case to the course of some future, more expeditious lawsuit, however, we permit the Board to continue its enforcement, for an indefinite period of time, of regulations which have been held facially unconstitutional by both of the courts below. In allowing the Board to reimpose its system of prior restraints on student publications, we raise a very serious prospect of the precise sort of chilling effect which has long been a central concern in our First Amendment decisions. *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Near* v. *Minnesota*, 283 U. S. 697 (1931). Any student who desires to express his views in a manner which may be offensive to school authorities is now put on notice that he faces not only a threat of immediate suppression of his ideas, but also the prospect of a long and arduous court battle if he is to vindicate his rights of free expression. Not the least inhibiting of all these factors will be the knowledge that all his efforts may come to nought as his claims are mooted by circumstances beyond his control.

In view of these likely consequences of today's decision, I am unable to join in the Court's rush to avoid resolving this case on the merits.